88-621

Supreme Court
FILE
JUL 18
JOSEPH F. SPAN
CLERK

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1987

TOWN OF RYE, NEW HAMPSHIRE
Petitioner

v.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
AND THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF TRANSPORTATION
TOWN OF HAMPTON FALLS, NEW HAMPSHIRE
Respondents

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF NEW HAMPSHIRE

PETITION FOR WRIT OF CERTIORARI

J. P. Nadeau, Esquire
507 State St.
Portsmouth, NH 03801
603-436-0110

Attorney for the
Petitioner,
Town of Rye, New Hampshire

Robert A. Backus, Esquire
P.O. Box 516
116 Lowell St.
Manchester, NH 03105
603-668-7272

Member of the Bar
United States
Supreme Court

QUESTION PRESENTED FOR REVIEW

May a locality refuse to accede to the installation of a particular emergency warning system proffered by a nuclear plant operator as a part of that plant's proposed Radiological Emergency Response Plan?

LIST OF PARTIES TO THE PROCEEDING BELOW

Town of Rye, New Hampshire, and

Town of Hampton Falls, New Hampshire

vs.

Public Service Company of New Hampshire and

State of New Hampshire, Department of Transportation

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW..... i

LIST OF PARTIES TO THE PROCEEDING BELOW..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES..... iii- v

OPINIONS BELOW..... vi

JURISDICTION..... vii

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED..... vii

STATEMENT OF THE CASE..... 1

ARGUMENT

THE DECISION OF THE NEW HAMPSHIRE SUPREME COURT BOTH DENIES THE PETITIONER RIGHTS WHICH ARE WELL ESTABLISHED UNDER FEDERAL LAW AND CONFLICTS WITH THE MANDATE OF FEDERAL STATUTES..... 12

A. THE PETITIONER HAS AN OBLIGATION UNDER STATE LAW TO PARTICIPATE IN THE EMERGENCY PLANNING PROCESS... 12

B. FEDERAL LAW PRESERVES AND PROTECTS THE LOCAL RIGHT OF PARTICIPATION IN NON-RADIOLOGICAL REGULATION..... 14

CONCLUSION..... 21

TABLE OF AUTHORITIES

Cases

Bennett v. Mallinchrodt, 698 S.W. 2d 854 (Mo. 1985)..... 11

Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk, 604 F Supp. 1084 (E.D.N.Y. 1985)..... 8,10

Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528 (1985)..... 14

Kelly v. Johnson, 425 U.S. 238 (1976)..... 13

In the Matter of Long Island Lighting Co., 21 N.R.C. 644, aff'd, 22 N.R.C. 651 (1985) reversed on other grounds, 24 N.R.C. 22 (1986)..... 20

Long Island Lighting Co. v. County of Suffolk, NY 628 F. Supp 654 (E.D.N.Y. 1986)..... 10

Marshall v. Consumers Power Co., 65 Mich. App. 237, 237 N.W.2d 266 (1975)..... 10

Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190 (1983)..... 15,16

Public Service Co. of New Hampshire v. Town of West Newbury, 835 F.2d 380 (1st Cir. 1987)..... 10

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984)..... 7,8,14 passim

TABLE OF AUTHORITIES (CONT'D)

Van Dissel v. Jersey Central Power & Light Co., 465 U.S. 1001, decision on remand, 194 N.J. Super. 108, 476 A.2d 310 (App. Div. 1984)..... 14

Van Dissel v. Jersey Central Power & Light Co., 194 N.J. Super. 108, 476 A.2d 310 (App. Div. 1984).... 11,19

Van Dissel v. Jersey Central Power & Light Co., 181 N.J. Super. 516, 438 A.2d 563 (App. Div. 1981).... 19

Vernet v. Town of Exeter, 129 N.H. 34, 523 A.2d 48 (1986)..... 13

Statutes

N.H. Rev. Stat. Ann. § 107-B:1 (Supp. 1987)..... 12

N.H. Rev. Stat. Ann. § 107-C:8(I) (Supp. 1987)..... 13

42§ U.S.C.A. § 2013 (West 1973).... 18

42§ U.S.C.A. § 2021 (West 1973).... 9,14,16

H.R. Rep. No. 1125, 86th Cong., 1st Sess. 3 (1959)..... 16

TABLE OF AUTHORITIES (CONT'D)

Other

Note, "Federalism and Offsite Emergency Planning for Nuclear Reactors: The Shoreham Impasse, " 66 B.U.L. Rev. 229 (1986)..... 9

Tomain, "Law and Policy in the Activist State--Rethinking Nuclear Regulation," 38 Rutgers L. Rev. 187 (1986).... 17

Wiggins, "Federalism Balancing and the Burger Court: California's Nuclear Law as a Preemption Case Study," 13 U.C. Davis L. Rev. 3 (1979)... 9

OPINIONS BELOW

On April 16, 1986, the trial court granted the Motion to Intervene filed by the Town of Hampton Falls, New Hampshire.

On November 26, 1986, the trial court entered an Order finding that the New Hampshire Department of Transportation was a necessary party to the dispute and requiring that department to file responsive pleadings (A-1). By Order dated January 20, 1987, the Superior Court found in favor of the Plaintiff Towns and ordered the Defendant to remove the poles and sirens at its sole expense within 30 days (A-2). By opinion dated March 29, 1988, the New Hampshire Supreme Court reversed the decision of the trial court (A-3). This opinion is reported in Volume 130 New Hampshire Reports. On April 21, 1988, the New Hampshire Supreme Court ordered that Town of Rye's Motion for Reconsideration be denied (A-4).

JURISDICTION

The decision of the New Hampshire Supreme Court is dated March 29, 1988. On April 21, 1988, the New Hampshire Supreme Court denied the Motion for Reconsideration filed by the Town of Rye. The jurisdiction of this Court is invoked pursuant to 28 U. S. C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following provisions are set forth in full in the Appendix, pursuant to Sup. Ct. R. 21:

U. S. Const. art. 6, c. 2
42 U. S. C. § 2013
42 U. S. C. § 2021
N. H. Rev. Stat. Ann.
§§ 107-B:1, 107-C:(I)
N. H. Rev. Stat. Ann.
§ 231:160
N. H. Rev. Stat. Ann.
§ 231:161

STATEMENT OF THE CASE

The Respondent, Public Service Company of New Hampshire, is a private electric utility company and controlling partner in the construction of the Seabrook Nuclear Power Station. On July 9, 1984, the Respondent submitted an application for a pole license to the Town Clerk of Rye. The application was submitted with no cover letter and did not reveal the special warning purpose to which the poles would be put.

In September 1984, an official of the Town of Rye signed the Respondent's pole license application after it had been routinely processed; the State Department of Transportation gave its permission to the company to install the poles. On November 7, 1985, the Respondent began installing poles with attached sirens within the municipality, two on municipal property. Affixed to the top of each pole is a 6-foot, 500-pound siren/public address system.

On November 20, 1985, the Town of Rye issued a cease and desist order against the Respondent's actions in installing the poles and revoked the pole license which had been issued by the Town to the Respondent. The Town also advised the Respondent that the installation of any poles for the purpose of attaching sirens to the poles was unacceptable to the Town.

After the Respondent refused to obey the cease and desist order issued by the Petitioner, the Petitioner instituted an action for declaratory relief. The Petitioner sought an order allowing it to revoke the pole license it had granted and also sought removal of certain poles installed within the town limits on state-maintained highways under licenses issued by the State. Citing Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk, 604 F. Supp. 1084 (E.D.N.Y. 1985), and Long Island Lightning

Co. v. County of Suffolk, 628 F. Supp. 654 (E.D.N.Y. 1986), the Town contended as follows:

> Case law indicates that under federal law a locality properly may refuse to participate in or cooperate with the formation and adoption of an emergency response plan for a nuclear power facility. The Petitioner, in refusing to approve the installation of poles and sirens within the municipality, is exercising this recognized right to withhold its support for such an emergency response plan.

(Trial Brief of the Town of Rye at 8.)

The Town of Hampton Falls was permitted to intervene to similarly seek removal of poles located in the Town. Following a hearing on November 26, 1986, the court determined that the State of New Hampshire Department of Transportation was a necessary party for the resolution of the dispute and ordered it to file responsive pleadings.

By order dated January 20, 1987, the Superior Court ordered removal of the poles and the siren/public address systems at

the Respondent's expense within 30 days of the order. The trial court noted the exclusivity of the list of authorized use enumerated N. H. Rev. State Ann. § 231:160, and the fact that the use of poles as part of a public emergency system was not included within the statute's coverage. Although not specifically reaching the Petitioner's claim of a federal right to act, the court did reject the Respondent's contention that Petitioners acted illegally in preventing the implementation of a federally required evacuation plan (Order of trial court dated January 20, 1987 at 1, 6). The court held that the licenses granted by the Town of Rye and by the State Department of Transportation for the erection of poles for a system of public notification were null and void.

On appeal, the petitioner contended that nuclear emergency warning systems were

not encompassed by state statutes concerning utility poles (brief on Appeal at 8). The Petitioner further noted as follows:

> [T]he Appellee's refusal to issue permits to the Appellant Company was based on its objective determination that, pursuant to the Appellee's plant, town residents could not safely be evacuated in the event of emergencies at the Seabrook station in instances of even moderate releases of radiation...
>
> The Appellee refusal to issue permits for the installation of said poles and sirens as part of a nuclear emergency response plan was clearly valid as an exercise of its well-recognized police powers.

(Brief on Appeal, Town of Rye, at 19).

The Supreme Court of New Hampshire reversed the judgment of the trial court, finding that state statutes regarding utility pole licensing did encompass emergency warning poles, and further finding that a town cannot exercise "veto power" over a radiological emergency response plan (Opinion of the Supreme Court of New Hampshire at 4). The

New Hampshire Supreme Court refused Petitioner's Motion for Reconsideration, which claimed, in part, as follows:

> The Town is concerned with such matters as a safe and orderly traffic flow in the event of evacuation and the provision of emergency services to those injured, perhaps in traffic, while in the process of evacuation.
>
> ... The Town maintains that the above-stated goals fall within the authority of local communities and that the Town may properly seek to participate in the planning process by the protection of those goals. Public Service Company of New Hampshire v. West Newbury 835 F.2d 380 (1st Cir. 1987); in fact, absent any affirmative interference amounting to a regulating of nuclear power, the Town may refuse cooperation with a particular proposal. Citizens For An Orderly Energy Policy, Inc. v. Suffolk County, 604 F. Supp. 1084 (E.D.N.Y. 1985).

(Motion for Reconsideration filed by Town of Rye at 8.)

ARGUMENT

THE DECISION OF THE NEW HAMPSHIRE SUPREME COURT BOTH DENIES THE PETITIONER RIGHTS WHICH ARE WELL-ESTABLISHED UNDER THE FEDERAL LAW AND CONFLICTS WITH THE MANDATE OF FEDERAL STATUTES.

The resolution of this case will affect the exercise of traditional authority of state and local governments, the regulation of nuclear power by the federal government, and the interaction between federal and local areas of regulation. For these reasons, which prompted this Court's examination of the claims presented in Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984), this case is important and should be taken up by the Court. 464 U.S. at 248.

This dispute requires construction and interpretation of the Atomic Energy Act and, thus, has arisen under that federal law.

See Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk, 604 F. Supp. 1084, 1090 (E.D.N.Y. 1985), aff'd, 813 F.2d 570 (2d Cir. 1987). The Petitioner claims a right guaranteed by federal statutes, specifically by the Atomic Energy Act. This right has been denied by the New Hampshire court's interpretation of state law. Moreover, the decision of the Supreme Court of New Hampshire has involved a question of federal law which has not been specifically addressed by this Court -- the issue of the extent of local authority to refuse the installation of certain emergency warning sirens, out of concern for factors other than purely radiological safety. The refusal of the state court to allow this local action conflicts with the Court's reservation of a local right of action for purposes other than protection against radiological hazards. Silkwood v. Kerr-McGee Corp., supra, 464 U.S. 238; see

also 42 U.S.C.A. section 2021(k) (West 1973).

Few issues have fostered such "widespread concern, inspired such acrimonious debate and proven more difficult to resolve" than those issues which focus on this nation's use of nuclear power. Wiggins, "Federalism Balancing and the Burger Court: California's Nuclear Law as a Preemption Case Study," 13 U.C. Davis L. Rev. 3 (1979). The Nuclear Regulatory Commission's offsite planning rules have been characterized as having created a "regulatory quagmire." Note, "Federalism and Offsite Emergency Planning for Nuclear Reactors: The Shoreham Impasse," 66 B.U.L. Rev. 229, 266 (1986). Meanwhile, relevant judicial decisions from jurisdictions throughout the country have often conflicted while providing no useful principles by which to reconcile their holdings.

See, e.g., Public Service Co. of New Hampshire v. Town of West Newbury, 835 F.2d 380 (1st Cir. 1987) (holding that a plant owner failed to show irreparable harm from the town's removal of poles bearing emergency sirens); Long Island Lighting Co. v. County of Suffolk, New York, 628 F. Supp. 654, 666 (E.D.N.Y. 1986) (holding that a nuclear plant owner demonstrated a likelihood of success on the merits of its claim that federal law preempted a local law making it illegal to engage in emergency testing without the approval of the local legislature); Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk, supra, 604 F. Supp. 1084, 1096 holding that the county's refusal to participate in offsite emergency planning was not preempted by federal law); Marshall v Consumers Power Co., 65 Mich. App. 237, 237 N.W. 2d 266, 274 (1975) (holding that a state

nuisance action directed against a proposed nuclear plant could consider any "nonradiological hazards," but that federal law preempts a consideration of the "workability" of the plant); Bennett v. Malinchrodt, 698 S.W. 2d 854, 863 (Mo. 1985), cert. denied, 476 U.S. 1176 (1985) (holding that an action for negligence, assault and battery and stict liability against a plant operator for injuries suffered by nearby workers was not barred by the doctrine of federal preemption); and Van Dissel v Jersey Central Power and Light Co., 194 N.J. Super. 108, 476 A.2d 310, 316 (App. Div. 1984) (where, on remand from the United States Supreme Court, the New Jersey court held that federal law did not preempt a compensatory award for property damage which was sustained as a direct result of problems with a nuclear plant cooling system). The decision of the Supreme

Court of New Hampshire which denies the local right here claimed conflicts with each listed decision which upholds a local claim or right against a claim of preemption. A resolution of the instant case will provide much-needed guidelines for deciding all future similar cases.

A. THE PETITIONER HAS AN OBLIGATION UNDER STATE LAW TO PARTICIPATE IN THE EMERGENCY PLANNING PROCESS.

State law requires that Petitioner to play a significant role in emergency planning. New Hampshire law declares that "(t)he director of emergency management shall, in cooperation with affected local units of government, initiate and carry out an nuclear emergency response plan ..." N.H. Rev. Stat. Ann. Sec. 107-B:1 (Supp. 1987) (emphasis added). The New Hampshire legislature has also provided for local organizations to perform emergency management functions, subject

to the control of the local board of selectmen. N.H. Rev. Stat. Ann. Sect. 107-C:8(I). "Where state law mandates that selectmen take responsibility for civil defense functions, the selectmen must carry out this duty." Vernet v. Town of Exeter, 129 N.H. 34, 523 A. 2d 48, 51 (1986). Throughout the instant dispute, the Petitioner has consistently acted in accordance with this statutory mandate.

Thus, pursuant to New Hampshire law, local officials serve an important role in the state's emergency management process. The federal regulatory scheme does not displace local authority to act. Rather, federal law recognizes that "(t)he promotion of safety of persons and property is unquestionably at the core of the State's police power." Kelley v. Johnson, 425 U.S. 238, 247 (1976). Local entitites retain their sovereign authority "to the extent that the Constitution has not divested them of their original powers and

transferred those powers to the Federal Government." Garcia v. San Antonion Metropolitan Transit Authority, 469 U.S. 528, 549 (1985).

B. FEDERAL LAW PRESERVES AND PROTECTS THE LOCAL RIGHTS OF PARTICIPATION IN NONRADIOLOGICAL REGULATION.

The Atomic Energy Act reserves to state and local entities the right to regulate for all purposes other than protection against radiological hazards. 42 U.S.C.A. Sect. 2021(h); Van Dissel v. Jersey Central Power & Light Co., 465 U.S. 1001, decision on remand, 194 N.J. Super. 108, 476 A.2d 310 (App. Div. 1984); Silkwood v. Kerr-McGee Corp., supra, 464 U.S. 238. In the instant case, the Petitioner is necessarily concerned about its ability to provide sufficient traffic control to evacuees and ambulance and other emergency services in the event of an emergency. These

are precise the sorts of functions which federal law reserves to local control.

As originally enacted, the Atomic Energy Act ended a federal monopoly over the use, control and ownership of nuclear technology. Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190, 206 (1983). The 1959 amendments to the Act were enacted in order to "clarify the respective responsibilities . . . of the States and the Commission with respect to the regulation of byproduct, source, and special nuclear materials." 42 U.S.C.A. Sect. 2021(a)(1). "{T}he point of the 1959 Amendments was to heighten the States' role." 461 U.S. at 209. "The 1959 legislation provided for continued federal control over the more hazardous materials because 'the technical safety considerations are of such complexity that it is not likely that any State would be prepared to deal with

them during the forseeable future.'" Silkwood v. Kerr-McGee Corp., supra, 464 U.S. at 250 (citing H.R. Rep. No. 1125, 86th Cong., 1st Sess. 3 (1959).

Thus, continued federal regulation over nuclear plants has resulted from a concern over the complexity of radiological operations. Yet, even within the sphere of "exclusive" federal jurisdiction, states have been provided an "advisory role." For instance, 42 U.S.C.A. Sect. 2021(g) directs the Commission to cooperate with states in forming standards against radiation hazards. See Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, supra 461 U.S. at 209 n.21. Congress not only created a scheme pursuant to which state and local entities were free to act in all but a few clearly defined areas; Congress has also encouraged local participation in radiological decisions -- those areas deemed the

"exclusive" province of the federal government. The clear congressional intent has been the preservation of the traditional police power functions of localities, especially in all nonradiological concerns. The Petitioner is entitled to act in response to such concerns as a safe traffic flow and the provision of emergency services in the event of an evacuation.

In Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, supra 461 U.S. 190 (1983), this Court "for the first time explicitly ruled that decisions regarding nuclear power are not within the exclusive province of the federal government." Tomain, "Law and Policy in the Activist State -- Rethinking Nuclear Regulation," 38 Rutgers L. Rev. 187, 209 (1986). In Pacific Gas, the Court upheld the constitutionality of a California state moratorium on the certification of nuclear plans, while

also upholding the appellate court's refusal to declare that law preempted by the Atomic Energy Act.

In Silkwood v. Kerr-McGee Corp., supra, 464 U.S. 238, the Court found that a state-authorized award of punitive damages was not preempted by federal law as "punish(ing) and deter(ring) conduct related to radiation hazards." 464 U.S. at 249. In answer to a charge of frustration of congressional purpose, the Court in Silkwood reiterated that "the promotion of nuclear power is not to be accomplished 'at all costs'" 464 U.S. at 257. Where Congress declared that atomic energy should only be developed to the extent "consistent 'with the health and safety of the public,'" 42 U.S.C.A. SDect. 2013(d), Congress also "disclaimed any interest in promoting the development and utilization of atomic energy by means that fail to provide adequate remedies for those who are injured

by exposure to hazardous nuclear materials." 464 U.S. 257.

Shortly thereafter, the Court vacated the judgment rendered in Van Dissel v. Jersey Central Power & Light Co., 181 N.J. Super. 516, 438 A.2d 563 (App. Div. 1981), and remanded the case for further consideration in light of Silkwood. On remand, the New Jersey court ruled that federal law did not preempt a compensatory award for property damage which arose from a nuclear power plant cooling system. Van Dissel v. Jersey Central Power & Light Co., supra 476 A.2d at 319. The court rejected an interpretation of federal preemption requirement which was based solely on the broadly phrased dicta of Pacific Gas and found that the admitted "safety" nature of the claim did not bar the action.

Thus, a safety-related function is reserved for localities. This conclusion is

borne out by the opinion of the Boards of Nuclear Regulator Commission. In In the Matter of Long Island Lighting Co., 21 N.R.C. 644, aff'd, 22 N.R.C. 651 (1985), reversed on other grounds, 24 N.R.C. (1986), the Licensing Board ruled that such "local matters" as the "flow of traffic on public roads" during an emergency are not preempted from local consideration. 21 N.R.C. at 904. Affirming, the Appeals Board stated as follows:

> To be sure, the conduct of such nonradiological activities heavily influences whether, or to what extent, viable emergency plans can be developed without governmental participation. But, as demonstrated by the Silkwood and Pacific Gas & Electric cases, such laws do not invade the federal domain simply because they have significant effect on nuclear power issues or even forclose the nuclear option entirely.

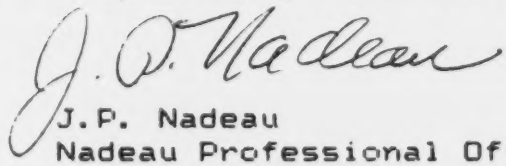
In summary, there has clearly been widespread acknowledgement of a federal right of locality to act for purposes other than protection against purely radiological hazards. In the instant case, Petitioner's concerns

about safe traffic regulation and the provision of emergency service to evacuees fall well within the scope of authority reserved to localities by federal law. The decision of the Supreme Court of New Hampshire, which effectively denies Petitioner this federal right, should be reversed.

CONCLUSION

For the foregoing reasons, the Petitioner respectfully requests this Court to grant this petition and issue a write of certiorari to the New Hampshire Supreme Court.

Respectfully submitted,



J.P. Nadeau
Nadeau Professional Offices
507 State Street
Portsmouth, New Hampshire
03801
(603)436-0110

Attorney for Petitioner

APPENDIX

APPENDIX 1

STATE OF NEW HAMPSIRE

ROCKINGHAM, SS: SUPERIOR COURT
(M.H.)

TOWN OF RYE, et al)
)
V.) Docket No. 86-E-34
)
PUBLIC SERVICE COMPANY)
)
OF NEW HAMPSHIRE)

ORDER

The plaintiff, Town of Rye, seeks declaratory relief allowing it to revoke certain pole licenses previously granted by the town's selectmen to the defendant to install poles on town-maintained right of way; and further, seeking the removal of poles installed within town limits on State-maintained highways, which were placed by the defendant pursuant to licenses issued by the State.

The Town of Hampton Falls has intervened as party plaintiff likewise seeking removal of poles located within the town on State-maintained highways.

The defendant is the controlling partner in the construction of the Seabrook Nuclear Power Station. As such, it is required by the Nuclear Regulatory Commission to develop a means of evacuation and response to potential catastrophes at the plant.

As part of its plan for evacuation and response, the defendant has installed a system for public notification consisting of a series of sirens placed on poles located in several New Hampshire communities, including the plaintiffs. The poles are appproximately 60 feet in height (as opposed to usual utility poles, 35 feet in height) and attached to the top of the poles is a 500 pound siren/public address system.

In November 1985, the defendant, through its Manager of Nuclear Projects, notified the Board of Selectmen of its intent to install these poles and sirens in different areas of the town. The selectmen made it clear by appropriate responses that it was their

intention to resist any such attempt.

Notwithstanding their insistence that they would not cooperate by permitting the poles to be installed for these purposes, the Selectmen, on September 10, 1984, pursuant to RSA 231:161 I(a), granted applications for pole permits submitted by the defendant to the Town Clerk on 7/9/84 for this purpose. It is the contention of the town selectmen that they were not aware that these poles were to be used for anything other than transmission of electric power despite the fact that the defendant's agent had indicated to the selectmen that they would be seeking pole licenses for this purpose.

Pursuant to the licenses, the defendant installed the poles and, in addition, installed a number of poles with like sirens on State-maintained highways located in the Town of Rye pursuant to licenses granted by the State pursuant to RSa 231:161 I(c). The defendant has likewise installed a series of

poles on State-maintained highways located in the Town of Hampton Falls pursuant to licenses obtained from the State.

The ultimate issue to be determined is whether RSA 231:160, et seq., authorizes the town and/or state to issue pole licenses for purposes related to this siren warning system.

Because the resolution of this petition for declaratory judgement necessarily involves judicial interpretation of those statutes, under the authority of which the State Department of Transportation purported to act in permitting the placement of the poles in the State-controlled rights of way, it is found that the State is a necessary party to these proceedings. To decide the issue as it pertains to the authority of the town selectmen to issue such licenses without giving the State an opportunity to be heard, thereon, could have the effect of binding the

town and not the State, which has the potential of leading to inconsistent results. Faulkner v. Keene, 85 NH 147 (1931).

It is accordingly ordered that orders of notice issue to the State of New Hampshire Department of Transportation together with a copy of the petition for declaratory judgement and this order requiring the State to file a formal answer within 20 days from the date of the issuance thereof.

It is further ordered that no further hearings on this matter will be held absent a specific request therefor by the State. The State shall have a period of 20 days from the date of filing of their answers to submit such memoranda of law on the issues as it wishes the Court to consider for the resolution of this petition.

DATED: Nov. 26, 1986

/s/ Walter L. Murphy

Walter L. Murphy

Presiding Justice

APPENDIX 2

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

* * * * * * * * * * * * * * * * * *

TOWN OF RYE, ET AL *

V * No. 86-E-34

PUBLIC SERVICE COMPANY OF N.H. *

* * * * * * * * * * * * * * * * * *

ORDER

The Plaintiff, Town of Rye, brought this action for declaratory relief against the Defendant, Public Service Company of New Hampshire, seeking an order allowing it to revoke certain pole licenses granted the Defendant to install poles on town-maintained rights-of-way and, further, seeking the removal of certain poles installed within the town limits on state-maintained highways under licenses issued by the state. The Town of Hampton Falls had intervened likewise seeking the removal of poles located in the town on state-maintained highways. On November 26, 1986, this Court determined that

the State of New Hampshire Department of Transportation (DOT) was a necessary party for the resolution of of this dispute and ordered the DOT to file responsive pleadings.

The Defendant, Public Service, is the controlling partner in the construction of the Seabrook Nuclear Power Station. As such, it is required by the Nuclear Regulatory Commission to develop a means of evacuation and response to potential catastrophes at the plant.

As part of its plan for evacuation and response, the Defendant has installed a system for public notification consisting of a series of sirens placed on poles located in several New Hampshire seacoast communities, including the Plaintiff Towns. The poles are approximately 60 feet in height (as opposed to a standard utility pole 35 feet in height) and attached to the top of the poles is a 500 pound siren/public address system. This is the sole use of the pole; it is used for no

other purpose.

In November of 1985, the Defendant, through its Manager of Nuclear Projects, notified the Board of Selectmen of the Town of Rye of its intent to place these poles and sirens in different areas of the town. The selectmen made it clear by appropriate response that it was their intention to resist any such attempt.

Notwithstanding their insistence that they would not cooperate by permitting the poles for these purposes, the Selectmen, on September 10, 1984, pursuant to R.S.A. 231:161 I(a), granted applications for pole permits submitted by the Defendant to the Town Clerk on July 9, 1984 for this purpose. It is the contention of the town selectmen that they were not aware that these poles were to be used for anything other than the transmission of electric power despite the fact that the Defendant's agent had indicatedd to the selectmen that they would be seeking pole licenses for this purpose.

Pursuant to these licenses and licenses granted by the DOT purportedly under the authority of R.S.A. 231:160 et seq., the Defendant has installed a number of poles with sirens throughout the Town of Rye on town-maintained highways and state-maintained highways. The Defendant has likewise installed a series of poles on state-maintained highways located in the Town of Hampton Falls pursuant to licenses obtained from the DOT.

The ultimate issue to be determined is whether R.S.A. 231:160 et seq., authorizes the towns and/or the State to issue pole licenses for the erection of poles for purposes related solely to this siren warning system. The Defendant and the DOT maintain shat said statutes are to be interpreted to include this purpose while the Plaintiff and intervenor maintain that this use is not consistent with the language or intent of the statute.

The authority to erect poles on the highways of the State is found in R.S.A. 21:160 which reads as follows:

> "Authority to Erect. Telegraph, television, telephone, electric light and electric power poles and structure, and underground conduits and cables, with their respective attachments and appurtenances may be erected, installed and maintained in any public highways and the necessary and proper wires and cable may be supported on such poles and structures or carried across or placed under any such highways by any person, copartnership or corporation as provided in this subdivision and not otherwise".

Thus, any pole erected on the highways of the State must be used within the parameters of this statute. Therefore, any license granted for the erection of a pole for the purpose outside of these parameters is null and void.

The legislature, through this statute, has listed those uses or purposes for which poles may be erected (the statute does not list the types of companies which may erect poles as the State contends). The list includes "telegraph, television, telephone, electric light and electric power poles ...," a very specific and limited enumeration.

It is a well-established principle of statutory construction that "the expression of one thing in a statute implies the exclusion of another" In Re Gamble, 118 N.H. 771, 777 (1978); See also Vaillancourt v Concord General Mutual Insurance Company, 117 NsH. 48 (1977); 2A J.Sutherland, Statutes and Statutory construction, Section 47.23-24 (4th ed. C. Sands 1973).

In this case, the legislature has provided a very specific and limited enumeration of uses for which poles may be erected on public highways. The statute contains no terms indicating the non-exclusivity of this list;

such as "such as ...," "like ..." or "including but not limited to ..." Therefore, applying the above stated principle of statutory construction, this Court must conclude that the legislature did not intend to allow the erection of poles by utility companies for any purpose the company may see fit, but only for those purposes listed. Thus, the licenses granted by the Defendant by the Town of Rye and the State Department of Transportation for the erection of poles for a system of public notification were granted without statutory authority and are, therefore null and void. Accordingly, the poles erected pursuant to these licenses were erected without authority.

This position is further supported by the legislative history of RSA 231:160. The statute has been amended a number of times since its passage in 1881 to accommodate technological innovations and the needs of society. These innovations include

telephones, television, electric lights and electric power. Each time the legislature has specifically amended the statute to provide for these innovations and has specifically listed that particular innovation as a permissable use for utility poles. The legislature could have used broad language in providing for future innovations or societal needs but has chose, instead, to provide specifically for each new use. Obviously, then, it is the role of the legislature to accommodate these new uses and not the role of this Court.

Even assuming arguendo, the list was not intended by the legislature to be exclusive, these poles and the use to which they have been put are not within the general nature of the types of uses designated in the statute. Excluding electric light poles, the poles designated in the statute are all utility poles; that is, they are all employed to provide some direct service to the public.

They all transmit some service to the homeowner. The Defendant argues that these poles do relate to the transmission of electricity. This relationship, however, is far too attenuated. In fact, the purpose to which these poles are put is far too novel to have been contemplated by the legislature in this statute.

Finally, these siren/public address systems can hardly be termed appurtenances. Webster defines an appurtenance as "a subordinate part of adjunct: accessory object," Webster's Collegiate Dictionary (1974). It's obvious that the sole purpose of these poles is the siren/public address sytem. They are, therefore, not subordinate or adjunct parts, but the only feature of these poles.

Defendant has cited in its Supplemental Memorandum of Law the case of Vernet, et al v. Exeter, 128 N.H. -------, (decided December 30, 1986 for the proposition that municipalities cannot exercise veto power

over the State's performance of its statutorily mandated functions. It contends that, by challenging the applicability of RSA 231:160 et seq., the plaintiff Towns are, in effect, seeking to exercise local authority to prohibit the State from implementing a nuclear emergency response plan as it is obliged to do under RSA 107-A, et seq and RSA 107-B et seq. This argument is without merit, however, as, in any event, it is not the State, but the defendant company which is taking the action the town seeks to enjoin. In short, the State is not, in authorizing the erection of the poles by the Defendant, exercising a function statutorily mandated. It is, rather, relying on the legislative authority of RSa 231:160 et seq, which for the reasons given herein does not authorize the erection of poles for this purpose.

For the foregoing reason, the Defendant is ordered to cause the removal of these poles and the siren/public address systems at is

sole expense within 30 days of the date hereof.

So Ordered.

January 20, 1987 /s/Walter L. Murphy
Walter L. Murphy
Presiding Justice

APPENDIX 3

NOTICE: This Opinion is subject to Motions for Rehearing under Rule 22 as well as formal revision before publication in the New Hampshire Reports. Readers are requested to notify the Clerk/Reporter, Supreme Court of New Hampshire, Supreme Court Building, Concord, New Hampshire 03301, of any errors in order that corrections may be made before the Opinion goes to press. THE CONTENTS OF THIS OPINION MAY BE DISCLOSED AT OR AFTER 8:00 A.M. ON THE DATE THE OPINION BEARS. IF THE OPINION IS RECEIVED BEFORE THAT TIME AND DATE, ITS CONTENTS SHOULD BE KEPT CONFIDENTIAL.

THE SUPREME COURT OF NEW HAMPSHIRE

Rockingham

No. 87-062

TOWN OF RYE and TOWN OF HAMPTON FALLS

v.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE and

THE STATE OF NEW HAMPSHIRE DEPARTMENT

OF TRANSPORTATION

Nadeau Professional Offices, of Portsmouth (J.P. Nadeau on the brief and orally), for the plaintiff Town of Rye.

Backus, Meyer & Solomon, of Manchester (Bartram C. Branch, Jr. on the brief and orally), for the plaintiff Town of Hampton Falls.

Sulloway, Hollis & Soden, of Concord (Margaret H. Nelson on the brief and orally) for the defendant Public Service Company of New Hampshire.

Stephen E. Merrill, attorney general (Michael J. Walls, assistant attorney general, on the brief and orally), for the State Department of Transportation.

JOHNSON, J. The defendant Public Service Company of New Hampshire (PSNH), jointed by the New Hampshire Department of Transportation (DOT), appeals an order of the Trial Court (Murphy, J.) permitting the Town of Rye to revoke the licenses which the town

had granted PSNH to erect siren poles on town-maintained rights-of-way as part of an evacuation plan for the Seabrook Nuclear Power Station. The court directed PSNH to remove those siren poles, as well as other siren poles which PSNH had erected in Rye and Hampton Falls on State-maintained highways. We reverse.

PSNH is the major owner of the Seabrook Nuclear Power Station. The plant is required by the federal Nuclear Regulatory Commission (NRC) to develop a Radiological Emergency Response Plan (RERP), which includes a evacuation plan, in order to be prepared for a potential accident at Seabrook Station. As part of its RERP, PSNH installed a public notification system consisting of sirens placed on poles located in several seacoast communities, including Rye and Hampton Falls. The poles are approximately sixty feet in height and have attached to them siren/public

address systems each weighing approximately 500 pounds.

On July 9, 1984, PSNH submitted to the Rye Town Clerk an application for licenses for three poles, to be erected on town-maintained highways in Rye. Subsequently, on July 11, 1984, PSNH submitted to the DOT a separate application in order to obtain licenses for siren poles to be placed on State-maintained highways in Rye and Hampton Falls. On September 10, 1984, the Rye Board of Selectmen, pursuant to RSA 231:161, I(a), granted the licenses sought by the company. On September 20, 1984, the DOT gave PSNH permission to begin installing the siren poles. On or about November 7, 1985, PSNH commenced installing four siren poles in Rye on State rights-of-way and two poles on town maintained highways.

On or about the same date, the Rye Board of Selectmen issued a cease and desist order against PSNH and revoked the pole licenses

which it had been issued on September 10, 1984. After PSNH refused to obey the cease and desist order, Rye instituted a "Petition for Declaratory Judgement With Prayers for Specific Performance" against PSNH, seeking (1) a ruling that the previously granted pole licenses on State and town highways were not properly authorized and (2) orders for their removal.

Hampton Falls was permitted to intervene in Rye's action, in order to seek the removal of siren poles which had been erected on State maintained highways in that town pursuant to State authorization. Hampton Falls claimed the poles had been placed contrary to two consecutive town meeting votes which had expressly prohibited the installation of the siren poles unless and until the citizens of Hampton Falls approved an overall evacuation plan for Seabrook Station. PSNH had not erected any siren poles on town-maintained highways in Hampton Falls because the Hampton Falls Board of Selectmen had denied licenses

on the ground that the proposed emergency plan was inadequate to warn and protect the town's residents in the event of a nuclear accident.

On November 26, 1986, a hearing was held on the petition of Rye and Hampton Falls, after which the trial court determined that the DOT was a necessary party to the towns' action and ordered the agency to file responsive pleadings.

On January 20, 1987, the trial court ordered the removal of all poles and siren/public address systems within the two towns at PSNH's expense within thirty days, whether located on State or municipal highways. This decision was based on the conclusion that the poles and sirens were not utility facilities, installations or structures within the meaning of RSA 231:160. The court determined that the licenses which Rye and the DOT had granted for the erection of siren poles had been

granted without statutory authority and were therefore null and void. PSNH appeals the trial court's order.

PSNH argues that the trial court erred in ruling that RSA 231:160 does not apply to siren poles installed as part of a federally mandated public notification system for Seabrook Station. We agree with PSNH that the trial court's construction of RSA 231:160 is unduly restrictive.

RSA 231:160 states:

"Telegraph, television, telephone, electric light and electric power poles and structures and underground conduits and cables, with their respective attachments and appurtenances may be erected, installed and maintained in any public highways and the necessary and proper wires and cables may be supported on such poles and structures or carried across or placed under any such highway by any person, copartnership or

corporation as provided in this subdivision and not otherwise."

The trial court determined that the legislature did not intend to allow utility companies to erect poles for the purpose of warning citizens of a nuclear emergency, but only for the transmission of telegraph, television and telephone signals and electric light and power. Hence, the trial court found that the licenses which had been granted to PSNH by Rye and the DOT for the erection of siren poles had been granted without statutory authority and were void.

We begin our analysis with an interpretation of the applicable statutes. In any case involving the construction of a statute, the starting point must be the language itself, and plain and unambiguous language will be given effect. Theresa S. v. Sup't of YDC, 126 N.H. 53, 55, 489 A.2d 592, 593 (1985); Dover Professional Fire Officers Assoc. v. City of Dover, 124 N.H. 165, 169,

470 A.2d 866, 868 (1983); Sutherland Stat Const Sec. 46.01 (4th ed. 1984). Words and phrases will be given their usual and common meaning unless the statute itself suggests otherwise. Appeal of Public Serv. Co. of N.H., 125 N.H. 46, 52, 480 A.2d 20, 24 (1984).

A subdivision of RSA chapter 231 provides for "Lines of Telegraph and Other Companies in Highways," and RSA 231:159 makes the provision of that subdivision applicable to all cities and towns. RSA 231:161, VI states that "[t]he holder of such a license [to erect poles], shall . . . be entitled . . . to erect . . .poles [and] structures . . . and to place upon such poles and structures the necessary . . . attachments and appurtenances which are required in the reasonable and proper operation of the business carried on by such licensee . . ." We conclude that sirens are "attachments" within the meaning of RSA 231:160 and RSA 231:161, VI.

The selectmen of Rye lack authority to revoke the licenes they granted to PSNH, or to deny applications for licenses to erect three siren poles on town-maintained highways for any reason other than a reason relating to "the safe, free and convenient use for public travel of the highway . . ." which is the criterion for the exercise of the selectmen's authority under the statute; and no safety-based justification for the revocation was articulated by the town. RSA 231:168.

In Vernet v. Town of Exeter, 129 N.H. 34, 523 A.2d 48 (1986), we concluded that RSA chapter 107-B requires that the State civil defense agency "must enclist the aid of the towns when preparing a [R]ERP for each of the affected towns, so that input will be received from each of the affected areas. This does not, however, give a town . . . veto power over [R]ERPs developed by the State civil defense agency." Id. at 39, 523

A.2d at 51. (Emphasis in original.) Similarly, RSA 231:159 et seq. do not give a town veto power over the erection of siren poles, pursuant to a RERP. Hampton Falls lacked authority to prohibit either cooperation by selectmen with radiological emergency response planning for Seabrook Station, or construction by PSNH on State highways in Hampton Falls of any installations necessary for the implementation of a RERP.

In a closely related case, Public Serv. Co. of N.H. v. Town of W. Newbury, 835 F.2d 380 (1st. Cir. 1987), PSNH's request for a preliminary injunction to allow its siren poles to remain in place was denied because PSNH failed to prove a likelihood of success in its argument that Massachusetts statutes permit the erection of siren poles for the Seabrook evacuation plan. The key Massachusetts statute in question, ch. 166, sec. 21, refers to the "transmission of electricity" for various purposes and permits

-49-

a company incorporated for such transmission to construct "lines for such transmission upon, along, under and across public ways . . ." Mass. Gen. L. ch. 166, sec. 21. The New Hampshire statutes vary in two significant ways: (1) RSA 231:160 does not refer to poles used to "transmit" power; and (2) there is no Massachusetts counterpart to RSA 231:161, VI which allows for the erection of poles "which are required in the reasonable and proper operation of the business carried on by such licensee . . . ." The New Hampshire statute, like the Massachusetts statute, has been amended from time to time as new technology has developed. However, we conclude that RSA 231:161, VI made it unnecessary for our legislature to amend the statute to specifically permit siren poles, since such poles are necessary for PSNH to carry out its business in supplying the electrical needs of its customers.

We hold that the trial court erred in ruling that the pole licenses had been granted without statutory authority and hense were null and void, and in ordering PSNH to remove the poles and sirens which PSNH had erected and placed in Rye and Hampton Falls. We reverse the decision of the trial court.

Reversed.

BATCHELDER, J., dissented; the others concurred.

BATCHELDER, J., dissenting: Because I do not read RSA 231:160 and :161, VI as broadly as the majority. I would uphold the trial court and therefore respectfully dissent.

APPENDIX 4

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 87-062 Town of Rye & Town of Hampton Falls v. PSC & a. the court upon April 21, 1988 made the following order:

Town of Rye's motion for reconsideration is denied.

Distribution:

J.P. Nadeau, Esq.

Counsel: Martin L. Gross

Robert Backus, Esq.

Michael J. Wallis, Esq.

Clerk, Rockingham County Superior Court

Ralph H. Wood,

Clerk

APPENDIX 5

Statutory

Provisions Involved

Lines of Telegraph and Other Companies in Highways

231:160 Authority to Erect. Telegraph, television, telephone, electric light and electric power poles and structures and underground conduits and cables, with their respective attachment and appurtenances may be erected, installed and maintained in any public highway and the necessary and proper wires and cables may be supported on such poles and structures or carried across or placed under any such highway by any person, copartnership or corporation as provided in this subdivision and not otherwise.

231:161 Procedure. Any such person, copartnership or corporations desiring to erect or install any such poles, structures, conduits, cables or wires in, under or across

any such highway, shall secure a permit or license therefor in accordance with the following procedure:

I. Jurisdiction.

(a) Town Maintained Highways. Petitions for such permits or licenses concerning town maintained highways shall be addressed to the selectmen of the town in which such highway is located; and they are hereby authorized to delegate all or any part of the powers conferred upons them by the provisions of this section to such agents as they may duly appoint.

(b) City Maintained Highways. Petitions for such permits or licenses concerning city maintained highways shall be addressed to the board of mayor and aldermen or board of mayor and council of the city in which such highway is located and they shall exercise the powers and duties prescribed in this part for selectmen; and they are hereby authorized to

delegate all or any part of the powers conferred upon them by the provisions of this section to such agents as they may duly appoint.

(c) State Maintained Highways. Petitions for such permits or licenses concerning all class I and class III highways and state maintained portions of class II highways shall be addressed to the state commissioner of public works and highways who shall have exclusive jurisdiction of the disposition of such petitions to the same effect as is provided for selectmen in other cases, and also shall have like jurisdiction for changing the terms of any such license or for assessing damages as provided herin. The commissioner shall also have the same authority as conferred upon the selectmen by RSA 231:163 to revoke or change the terms and conditions of any such license. The

commissioner is hereby authorized to delegate all or part of the powers conferred upon him by the provisions of this section to such agent or agents as he may duly appoint in writing; he shall cause such appointments to be recorded in the office of the secretary of state, who shall keep a record thereof.

(d) The word "selectmen" as used in the following paragraphs of this section shall be construed to include all those having jurisdiction over the issuance of permits or licenses under paragraph I hereof.

II. Permits. The petitioner may petition such selectmen to grant a permit for such poles, structures, conduits, cables or wires. If the public good requires, the selectmen shall grant a permit for erecting or installing and maintaining such poles, structures, conduits, cables or wires. Such permit shall designate and define in a general way the location of the poles,

structures, conduits, cables or wires described in the petition therefor. Such permit shall be effective for such term as they may determine, but not exceeding one year from the date thereof, and may, upon petition, be extended for a further term not exceeding one year. A permit shall not be granted to replace an existing utility pole on any public highway unless such replacement pole is erected at least 20 feet from the surfaced edge or the edge of public easement therein, provided, however, that for good cause shown the selectmen may waive the 20 foot requirement.

III. Effects of Permit. Except as otherwise provided herein, the holder of such permit shall during the term thereof be entitled to have and exercise all the rights, privileges and immunities and shall be subject to all the duties and liabilities granted or imposed hereby upon the holder of the license

hereunder.

IV. Licenses. The petitioner may petition such selectmen to grant a license for such poles, structures, conduits, cables or wires. If the public good requires, the selectmen shall grant a license for erecting and installing or maintaining the poles, structures, conduits, cables or wires described in the petition.

V. Provision of Licenses. The selectmen in such license shall designate and define the maximum and minimum length of poles, the maximum and minimum height of structures, the approximate location of such poles and structures and the minimum distance of wires above and of conduits and cables below the surface of the highway, and in their discretion the approximate distance of such poles from the edge of the traveled roadway or of the sidewalk, and may include reasonable requirements concerning the

slacement of reflectors thereon. Such designation and definition of location may be by reference to a map or plan filed with or attached to the petition or license.

VI. Effect of License. All licenses granted under the provisions hereof shall be retroactive to the date the petition therefor is filed. The word "license" as hereinafter used herein, except in RSA 231:164 shall be construed to include the word "permit". The holder of such a license, hereinafter referred to as licensee, shall thereupon and thereafter be entitled to exercise the same and to erect or install and maintain any such poles, structures, conduits, cables, and wires in approximately the location designated by such license and to place upon such poles and structures the necessary and proper guys, cross-arms, fixtures, transformers and other attachments and

appurtenances which are required in the reasonable and proper operation of the business carried on by such licensee, together with as many wires and cables of proper size and description as such poles and structures are reasonably capable of supporting during their continuance in service; and to place in such underground conduits such number of ducts, wires and cables as they are designed to accommodate, and to supply and install in connection with such underground conduits and cables the necessary and proper manholes, drains, transformers and other accessories which may reasonably be required.

231:162. Confirming Locations. Similar proceedings may be had for locating and licensing poles and structures and underground conduits and cables already constructed with or without license, or for changing the location of any such property

constructed with or without license; but nothing contained in this section or this subdivision shall affect the validity of locations heretofore granted.

23:163. Changes. Any such licensee or any persons whose rights or interests are affected by any such license may petition the selectmen for changes in the terms thereof; and after notice to the parties and hearing, the selectmen may make such alterations therein as the public good requires. The selectmen, after notice to any such licensee and hearing, may from time to time revoke or change the terms and conditions of any such license, whenever the public good requires.

Supreme Court, U.S.
FILED
NOV 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-621

In The

Supreme Court of the United States

OCTOBER TERM, 1988

TOWN OF RYE, NEW HAMPSHIRE,

Petitioner,

v.

PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE
AND
THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF TRANSPORTATION
AND
TOWN OF HAMPTON FALLS, NEW HAMPSHIRE

Respondents.

BRIEF OF PUBLIC SERVICE COMPANY OF NEW HAMPSHIRE IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE NEW HAMPSHIRE SUPREME COURT

MARTIN L. GROSS
(Counsel of Record)
MARGARET H. NELSON
SULLOWAY HOLLIS & SODEN
9 Capitol Street
P.O. Box 1256
Concord, New Hampshire 03302
(603) 224-2341
Counsel for Respondent
Public Service Company of
New Hampshire

November 9, 1988

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether this Court should allow the Petitioner to seek certiorari on the basis of a federal question which the Petitioner failed to raise before the state court?

2. Whether a state court's interpretation of a state pole licensing statute raises a substantial federal question where the state court's decision did not impair or affect any rights which the Petitioner had under the Atomic Energy Act?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

REASONS FOR DENYING THE WRIT 3

A. THE ISSUE RAISED BY THE PETITIONER WAS NOT PRESERVED BELOW 3

B. THE PETITIONER HAS FAILED TO PRESENT ANY FEDERAL QUESTION WARRANTING THIS COURT'S REVIEW 4

CONCLUSION 10

APPENDIX A (Petitioner's Brief to the New Hampshire Supreme Court) A1

APPENDIX B (Petitioner's Motion for Reconsideration to the New Hampshire Supreme Court) B1

TABLE OF AUTHORITIES

Page

CASES:

Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk, 604 F.Supp. 1084 (E.D.N.Y., 1985) aff'd, 813 F.2d 570 (2nd Cir., 1987) 8

Duncan v. Tennessee, 405 U.S. 127 (1972) 5

Edelman v. California, 344 U.S. 357 (1953) 3

Ennis Water Works v. Ennis, 233 U.S. 652 (1914) 5

Herndon v. Georgia, 295 U.S. 441 (1935) 4

Mullaney v. Wilbur, 421 U.S. 684 (1975) 7

Murdock v. City of Memphis, 87 U.S. 590 (1874) 7

Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n, 461 U.S. 190 (1983) 7, 8

Parker-Young Co. v. State, 83 N.H. 551, 145 A. 786 (1929) 6

Scripto, Inc. v. Carson, 362 U.S. 207 (1960) 7

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 8

Swafford v. Templeton, 185 U.S. 487 (1902) 5

Tacon v. Arizona, 410 U.S. 351 (1973) 3

Vernet v. Exeter, 129 N.H. 34, 523 A.2d 48 (1986) 6

Waters-Pierce Oil Co. v. Texas, 212 U.S. 86 (1909) 5

TABLE OF AUTHORITIES–Continued

Page

FEDERAL STATUTES AND RULES

28 U.S.C. § 1257(a) 4

42 U.S.C. § 2021(k) 3, 7, 8

10 C.F.R. § 50.47(b)(5) 1

NEW HAMPSHIRE STATUTES

N.H. Rev. Stat. Ann. § 107-B (1985 Supp.) 6

N.H. Rev. Stat. Ann. § 231:160 (1982) 1, 2, 5

N.H. Rev. Stat. Ann. § 231:161,VI (1982) 6

N.H. Rev. Stat. Ann. § 231:168 (1982) 6

STATEMENT OF THE CASE

This Petition for a Writ of Certiorari arises from a decision of the New Hampshire Supreme Court interpreting a New Hampshire statute, N.H. Rev. Stat. Ann. § 231:160 *et seq.* (1982), governing placement of utility facilities on State and locally maintained highways.

In conformance with this statute, Public Service Company of New Hampshire ("PSNH") submitted applications for pole licenses to the Petitioner to install certain poles bearing sirens designed to meet PSNH's obligations to provide a public alerting and notification system within a ten mile radius of the Seabrook Nuclear Generating Station, a nuclear generating facility owned by PSNH and other New England utilities. 10 C.F.R. § 50.47(b)(5). It was undisputed that the applications had been submitted following a meeting of the Petitioner's Board of Selectmen at which Bruce Beckley, PSNH's Manager of Nuclear Projects, had fully described the purpose of the proposed siren poles. Simultaneously, PSNH also sought permission from the State of New Hampshire ("the State") to erect similar siren poles on State-maintained highways within the geographical boundaries of the Petitioner.

The Petitioner issued pole licenses to PSNH authorizing PSNH to install siren poles along highways maintained by the Petitioner. The State also gave PSNH permission to erect siren poles on State-maintained highways. PSNH proceeded to install the siren poles. Only at that juncture did the Petitioner seek to revoke the licenses it had previously granted to PSNH.

When PSNH declined to remove the siren poles on the grounds that the Petitioner had not alleged a proper

basis for revocation under state law, the Petitioner commenced a declaratory judgment petition in the New Hampshire Superior Court, seeking an order that it was authorized to revoke the pole licenses under state law.

The Town of Hampton Falls, New Hampshire intervened to challenge the placement of siren poles by PSNH on State-maintained highways in that community. Following hearings, the trial court ordered that the State become a party.

The trial court ruled that the siren poles did not come within the class of utility facilities authorized to be placed on State and local highways by N.H. Rev. Stat. Ann. § 231:160 et. seq. (1982) and ordered their removal.

PSNH and the State appealed the trial court's order to the New Hampshire Supreme Court ("the State court") which held as a matter of state law, siren poles did fall within the embrace of the pole licensing statute. Furthermore, the State court found that the Petitioner had advanced no appropriate safety-related justification for its purported revocation within the meaning of the statute.

Following denial of its Motion for Reconsideration, the Petitioner brought this Petition for Writ of Certiorari.

SUMMARY OF ARGUMENT

The Petitioner is not entitled to the extraordinary remedy of a Writ of Certiorari. First, the Petitioner failed to raise before the State court the issue which it now wishes this Court to review. Second, the State court's

interpretation of the New Hampshire pole licensing status is not repugnant to or consistent with federal law. The State court's decision defined the parameters of the Petitioner's rights under state law. The Petitioner cannot seek to use a doctrine of limited federal pre-emption in the field of civil nuclear power production to vest it with rights which are unavailable under state law. Therefore, there is no substantial federal question warranting this Court's review.

REASONS FOR DENYING THE WRIT

A. THE ISSUE RAISED BY THE PETITIONER WAS NOT RAISED BELOW.

The settled practice of this Court is not to consider, except in highly unusual circumstances, questions which were not raised before the State court. *Tacon v. Arizona*, 410 U.S. 351 (1973); *Edelman v. California*, 344 U.S. 357 (1953). This rule extends to the federal question which the Petitioner raises for the first time here.

An examination of the Petitioner's brief to the State court in this matter (reproduced herein as Appendix A) demonstrates that the Petitioner failed to argue to that court that interpreting New Hampshire's pole licensing statute to allow installation of the disputed siren poles would be repugnant to the Atomic Energy Act, in particular, 42 U.S.C. § 2021(k).

While the Petitioner may argue that its Motion for Reconsideration of the State court's decision (reproduced herein as Appendix B) did cite at least one federal authority now relied upon to support its request for a writ of

certiorari, even at that stage of the proceeding, the Petitioner failed to articulate its present claim of a federal right to assert local regulatory authority.

In some exceptional circumstances, this Court has held that an issue may be preserved for this Court's review even if raised for the first time in post-judgment motions where the issue could not fairly have been anticipated before the State court's decision. *See, e.g., Herndon v. Georgia*, 295 U.S. 441 (1935). However, in the present case, the Petitioner cannot fairly claim that it could not have anticipated a federal question prior to the State court's decision because the Petitioner had to have known that an order in favor of PSNH and the State's interpretation of the statute would affect its authority to compel removal of the poles.

Therefore, even if the Petitioner's Motion for Reconsideration could be read to set forth its present claim, it should be considered untimely and insufficient to preserve the question for this Court's review.

B. THE PETITIONER HAS FAILED TO PRESENT ANY FEDERAL QUESTION WARRANTING THIS COURT'S REVIEW.

28 U.S.C. § 1257(a) permits this Court to review final judgments of the highest court of a state where:

> [T]he validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or

statutes of, or any commission held or authority exercised under, the United States.

This Court's jurisdiction under this statute is not that of general appellate review but is limited to specific instances of denials of federal rights. *Duncan v. Tennessee*, 405 U.S. 127 (1972); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909). Any federal question presented must be substantial and where there is no foundation in the record for the federal question purportedly giving rise to this Court's jurisdiction, the Petition must be dismissed. *Ennis Water Works v. Ennis*, 233 U.S. 652 (1914); *Swafford v. Templeton*, 185 U.S. 487 (1902).

The Petitioner's request for a writ of certiorari plainly fails to meet these exacting standards. The State court decision did not impair or affect any rights which the Petitioner has under federal law. Indeed, the Petitioner's attempts to create certain federal rights are unsupported by a review of the Atomic Energy Act and this Court's decisions under that statute. Therefore, the Petition should be denied.

An examination of the grounds for the State court's decision demonstrates the fallacy of the Petitioner's claims. The State court was required to determine whether New Hampshire's pole licensing statute, N.H. Rev. Stat. Ann. § 231:160 *et seq.* (1982), applied to the installation of siren poles installed as part of a public alerting and notification system required by federal law. The State court ruled that the pole licensing statute authorized the installation of the siren poles, finding that the sirens were "attachments" within the meaning of N.H. Rev. Stat. Ann. § 231:160 (1982) and that the siren

poles were "required in the reasonable and proper operation of the business of" PSNH within the meaning of N.H. Rev. Stat. Ann. § 231:161,VI (1982).

Since the statute applied, the State court ruled that the licenses which had been issued to PSNH could only be revoked for a reason relating to "the safe, free and convenient use for public travel of the highway." N.H. Rev. Stat. Ann. § 231:168. That statutory mandate gave the Petitioner the authority to regulate only the proper location of the siren poles so as not to unduly interfere with other public uses of the highway. *Parker-Young Co. v. State,* 83 N.H. 551, 145 A. 786 (1929). Based upon its review of the record, the State court concluded that the Petitioner had articulated no legitimate safety-based justification for its purported revocation of the licenses issued to PSNH within the meaning of the statute.

Relying upon its prior decision in *Vernet v. Exeter,* 129 N.H. 34, 523 A.2d 48 (1986), construing N.H. Rev. Stat. Ann. § 107-B (1985 Supp.), the State Nuclear Planning and Response Program Act, the State court ruled that the Petitioner could not exercise veto power over the development of the State's radiological emergency response plan (RERP) under the guise of its limited authority under the pole licensing statute. The responsibility for development of a RERP lay with the State, not individual municipalities. While the statute directed the State to cooperate with the affected municipalities, cooperation did not mean that municipalities had the right to approve all aspects of the State's RERP. *Vernet v. Exeter, supra.*

This Court has long recognized that a state court of final appellate jurisdiction, such as the New Hampshire

Supreme Court, is the final authority on issues of state law. *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960); *Murdock v. City of Memphis*, 87 U.S. 590 (1874). Accordingly, the State court's decision defined the scope of the Petitioner's rights under prevailing state law.

The Petitioner seeks to avoid the effect of the State court's decision by claiming that the decision was in some way inconsistent with the Atomic Energy Act, 42 U.S.C. § 2021(k) which provides:

> *State Regulation of Activities for Purposes Other Than Protection Against Radiation Hazards.* Nothing in this section shall be construed to affect the authority of any State or local agency to regulate activities for purposes other than protections against radiation hazards.

This attempt must fail as the State court decision cannot be fairly read to limit any rights the Petitioner has under the Atomic Energy Act.

This Court has ruled that under the Atomic Energy Act, the federal government has exclusive authority to regulate the radiological safety aspects involved in the construction and operation of a nuclear plant. However, the states retain their traditional regulatory responsibilities which are not inconsistent with the federal government's paramount jurisdiction over radiological safety. *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Comm'n*, 461 U.S. 190 (1983).

The Petitioner's present claims misconstrue the effect of the limitations upon federal pre-emption expressed in 42 U.S.C. § 2021(k) and further articulated by this Court in *Pacific Gas, supra*. Indeed, *Pacific Gas* makes it plain

that 42 U.S.C. § 2021(k) operates only to limit the pre-emptive effect of federal law and does not represent an affirmative grant of power to the states. *Id.* at 210. Thus, the Petitioner cannot seek to override an interpretation of state law by the highest state court by its reliance on the Atomic Energy Act.

Indeed, the authorities relied upon by the Petitioner do not support its argument. Those cases involve circumstances where the Atomic Energy Act or other federal law has been held not to pre-empt certain rights granted by state law, but these authorities do not go so far as to create rights or privileges over and above those created by state law. *See, e.g., Silkwood v. Kerr-McGee Corp,* 464 U.S. 238 (1984) [holding that an award of punitive damages under state tort law was not pre-empted by the authority vested in the Nuclear Regulatory Commission by the Atomic Energy Act]; *Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk,* 604 F.Supp. 1084 (E.D.N.Y., 1985), *aff'd,* 813 F.2d 570 (2d Cir., 1987) [county legislature's refusal to participate in off-site emergency evacuation planning was not pre-empted by the Atomic Energy Act]; *Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Comm'n, supra* [state statute authorizing state energy commission to determine on a case-by-case basis that there will be adequate capacity for storage of a plant's spent fuel rods as required and imposing a moratorium on new nuclear plants until the state energy commission finds that an appropriate means of disposing of such waste exists not pre-empted by the Atomic Energy Act since the statute was consistent with traditional regulatory concerns reserved to the state].

The sole issue in this case was the proper interpretation of state law. The State court held that the siren poles fell within the class of utility facilities which could be placed on State and local highways. It went on to conclude that the Petitioner had failed to demonstrate any appropriate safety-based justification for its purported revocation because there had been no showing that the poles were located in such a way as to interfere with other public uses of the highway. Moreover, the State court made it plain that the State had paramount responsibility for the formulation of nuclear emergency planning, not the local municipalities.

The blunt truth is that the New Hampshire Supreme Court, the final arbitrator of New Hampshire law, ruled that the Petitioner did not have the right under State law to prevent the installation of PSNH's siren poles within its geographical boundaries. The State court decision, in no way, affected whatever rights the Petitioner had or has to challenge the adequacy of the State's RERP before the Nuclear Regulatory Commission or through any other appropriate means. The State court's decision cannot be considered as repugnant or inconsistent with federal law. Contrary to its claims, the Petitioner is not seeking to restore the traditional balance between federal and state authority. In fact, the Petitioner, having failed to persuade the State court, is asking this Court to vest the Petitioner with certain rights which it plainly does not have under New Hampshire law. Accordingly, no substantial federal question warranting this Court's review is presented.

CONCLUSION

For the reasons stated, the Respondent, Public Service Company of New Hampshire, respectfully requests that the Petition for Writ of Certiorari be denied.

MARTIN L. GROSS
(Counsel of Record)
MARGARET H. NELSON
SULLOWAY HOLLIS & SODEN
9 Capitol Street
P.O. Box 1256
Concord, New Hampshire 03302
(603) 224-2341
Counsel for the Respondent

November 9, 1988

APPENDIX A TO
BRIEF OF PUBLIC SERVICE COMPANY
OF NEW HAMPSHIRE
IN OPPOSITION TO PETITION
FOR A WRIT OF CERTIORARI
TO THE NEW HAMPSHIRE SUPREME COURT

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

1987 TERM
AUGUST SESSION

No. 87-062

Town of Rye and Town of Hampton Falls

v.

Public Service Company of New Hampshire and
The State of New Hampshire
Department of Transportation

APPEAL FROM THE DECISION OF THE SUPERIOR COURT OF THE STATE OF NEW HAMPSHIRE TO THE STATE OF NEW HAMPSHIRE SUPREME COURT

BRIEF OF APPELLEE
TOWN OF RYE

J.P. Nadeau, Esquire
Attorney for the Appellee,
Town of Rye
Nadeau Professional Offices
507 State Street
Portsmouth, NH 03801
(603) 436-0110

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF FACTS 1

SUMMARY OF ARGUMENT 4

ARGUMENT

I. THE TRIAL COURT WAS CORRECT AS A MATTER OF LAW IN RULING THAT *N.H.R.S.A.* § 231:160 DID NOT APPLY TO POLES WITH ATTACHED SIRENS TO BE USED AS PART OF A PUBLIC EMERGENCY SYSTEM 8

II. APPELLANT'S SECOND ARGUMENT IMPROPERLY ATTEMPTS TO RAISE ON APPEAL AN ISSUE NOT RAISED OR LITIGATED IN THE PROCEEDINGS BELOW AND SEVERELY MISCHARACTERIZES THE PROCEEDINGS BELOW 17

III. APPELLANT'S ASSERTION THAT BY CHALLENGING THE APPLICABILITY OF *N.H.R.S.A.* § 231:160 ET SEQ., THE APPELLEE SOUGHT TO EXERCISE LOCAL AUTHORITY TO PROHIBIT THE STATE FROM IMPLEMENTING A NUCLEAR EMERGENCY RESPONSE PLAN IS CLEARLY ERRONEOUS AND IS AN IMPROPER ATTEMPT TO RAISE ON APPEAL AN ISSUE WHICH FORMED NO BASIS FOR THE LOWER COURT'S DECISION 23

CONCLUSION 25

CERTIFICATE OF SERVICE 26

TABLE OF AUTHORITIES

Cases *Page*

American Legion Post No. 94 v. Jefferson Insurance Co. of New York, 125 N.H. 758 (1984) 17

Daboul v. Town of Hampton, 124 N.H. 307 (1983) 17

Hackett v. Gale, 104 N.H. 90 (1960) 12

Hambry v. Adams, 117 N.H. 606 (1977) 14

Hauser v. Calawa, 116 N.H. 676 (1976) 17

In re Gamble, 118 N.H. 771 (1978) 8

King v. Town of Lyme, 126 N.H. 279 (1985) 11

Manchester Gas Co. v. Griffen Construction Co., 119 N.H. 179 (1979) 22

N.H. Department of Revenue Administration v. Public Employment Labor Relations Board, 117 N.H. 976 (1977) 14

N.H. Retirement System v. Sununu, 126 N.H. 104 (1985) 13

Nowell v. Union Mutual Fire Insurance Co., 119 N.H. 855 (1979) 17

Opinion of Justices, 101 N.H. 527 (1957) 22

Parker-Young Co. v. State, 83 N.H. 551 (1929) 11

Piane v. Town of Conway, 118 N.H. 883 (1978) 20

Piper v. Meredith, 110 N.H. 291 (1970) 19

Silva v. Botsch, 120 N.H. 600 (1980) 9

Sperl v. Sperl, 119 N.H. 818 (1979) 17

State v. Small, 99 N.H. 349 (1955) 13

State v. Zetterberg, 109 N.H. 126 (1968) 20

TABLE OF AUTHORITIES CONT.

CASES — Page

State Employees' Association of New Hampshire Inc. v. State, 127 N.H. 565 (1986) 14, 16

Town of Deering ex rel. Bittenbender v. Tibbetts, 105 N.H. 481 (1964) 20

Town of Freedom v. Gillespie, 120 N.H. 576 (1980) 19

Town of Plainfield v. Hood, 108 N.H. 502 (1968) 20

Vaillancourt v. Concord General Mutual Insuarance Co., 117 N.H. 48 (1977) 9

Vernet v. Exeter, 128 N.H. ___ (December 30, 1986) 24

STATUTES

N.H.R.S.A. § 31:39 19

N.H.R.S.A. §§ 107-A et seq. 6, 7, 23, 24

N.H.R.S.A. §§ 107-B et seq 6, 7, 23, 24

N.H.R.S.A. §§ 231-159 et seq 6, 18, 19

N.H.R.S.A. §§ 231-160 et seq ..... passim

OTHER AUTHORITY

2A J. Sutherland, Statutes and Statutory Construction § 47.23 (C. Sands 4th ed. 1984) 9

64 *C.J.S.* "Municipal Corporations" § 1740(3) (1950) 22

STATEMENT OF FACTS

On or about November 7, 1983, the Appellant Public Service Company of New Hampshire (hereinafter PSCNH), a private electric utility company and controlling partner in the construction of the Seabrook Nuclear Power Station, contacted the Appellee, Town of Rye, concerning the Appellant's proposal to install a public alerting and notification system within the municipality as part of an emergency evacuation plan for the Seabrook Nuclear Generating Station. The Appellant proposed to install four poles with sirens attached on state right-of-ways within the municipality and three poles with sirens on municipality owned property. From the time of Appellant's initial proposal to the present, the Appellee has consistently opposed the Appellant's proposal to install the public alerting system within the municipal boundaries on the grounds that such system is likely to be ineffective in evacuating residents and likely to create a false sense of security among town residents (Tr. 5, 17-18) (all references to transcript are to the hearing of November 13, 1986).

On July 9, 1984, the Appellant, subsequent to its initial proposal to the Appellee, submitted an application for a pole license with the Appellee's town clerk. The license application was submitted without a cover letter and without any explanation of the purpose to which the poles would be put (Tr. 22, 27, 37, 101). Subsequently, a separate application was submitted to the state of New Hampshire for poles with attached sirens to be placed on various state-maintained roads in the towns of Rye and Hampton Falls.

In September 1984, an official of the Appellee Town signed the Appellant's pole license application after it had been routinely processed and the State Department of Transportation gave its permission to the Appellant Company to install the poles. On November 7, 1985, the Appellant Company began installing four poles with attached sirens on state right-of-ways within the municipality and installed two of the three remaining poles on municipal property. The poles are approximately 60 feet in height (as opposed to a utility pole of 35 feet in height) (Tr. 90, 109-110) and affixed to the top of each pole is a 6-foot, 500-pound siren/public address system (Tr. 108, Appendix to Appeal 113) (references to Appendix are to Appendix to Notice of Appeal). These poles are used solely for a siren/public address system in conjunction with the nuclear emergency response plan for Seabrook Station. Having been notified of the appellant's intent to place these poles and sirens in different areas of the Town, the Board of Selectmen of the Town of Rye made it clear by appropriate response that it was their intention to resist any such attempt (Appendix to Appeal 113). The Appellee on November 20, 1985 issued a cease and desist order against the Appellant company's actions in installing the poles and revoked the pole license which had been issued by the Appellee to the Appellant (Tr. 47). The Appellee also advised the Appellant that the installation of any poles for the purpose of attaching sirens to the poles was unacceptable to the Appellee.

After the Appellant refused to obey the cease and desist order issued by the Appellee, the Appellee instituted an action for declaratory relief against the Appellant company (Appendix to Appeal pp. 17-19).

Specifically, the Appellee sought an order allowing it to revoke the pole license it had granted to the Appellant to install poles on town-maintained rights-of-way and also sought removal of certain poles installed within the town limits on state-maintained highways under licenses issued by the state. The Town of Hampton Falls was permitted to intervene to similarly seek removal of poles located in the town on state-maintained highways. Following a hearing on November 26, 1986, the court determined that the state of New Hampshire Department of Transportation (DOT) was a necessary party for the resolution of the dispute and ordered the DOT to file responsive pleadings (Appendix to Appeal 87-91, 112).

By order dated January 20, 1987, the superior court, Walter L. Murphy presiding, ordered removal of the poles and the siren/public address systems at the Appellant's expense within 30 days of the order (Appendix of Appeal 112-18). The sole ground on which the superior court justice based his decision was the fact that the poles and sirens in question were found not be in the class of utility facilities, installations, or structures within the meaning of *N.H.R.S.A.* §§ 231-160 et seq. In ruling in favor of the Appellee, the trial court held that the poles in question were not "telegraph, television, telephone, electric light and power poles" within the meaning of the statute. The trial court noted the exclusivity of the list of authorized uses enumerated in § 231:160 and the fact that the use of poles as part of a public emergency system was not included within the statutes's coverage. Thus the court held that the licenses granted by the Town of Rye and by the State Department of Transportation for the erection of poles for a system of public notification were

granted without statutory authority and were, therefore null and void.

SUMMARY OF ARGUMENT

The trial court was correct as a matter of law in ruling that *N.H.R.S.A.* § 231:160 did not apply to poles with attached sirens to be used as part of a public emergency system. 231:160 specifically lists, and thereby manifests an intent to limit, the types of poles to be included within the scope of the statute. Noticeably absent from the list is any reference to poles which are sought to be installed as part of a public emergency system. Furthermore, the fact that no catch-all provision is found reinforces the conclusion that the legislature clearly intended the list set forth in the statute to be exclusive. The lower court correctly applied the rule of statutory construction that the expression of one thing in a statute implies the exclusion of another. Furthermore, the statute contains no terms indicating the nonexclusivity of the list. Legislative history of *N.H.R.S.A.* § 231-160 further supports the court's conclusion that siren poles were not intended to be included within the scope of the statute.

Moreover, even if, *arguendo*, the list were not intended by the legislature to be exclusive, the poles in issue and the use to which they are sought to be put still do not fall within the scope of § 231:160. The siren poles constitute neither utility poles nor structures within the meaning of the statute. Furthermore, the sirens cannot be termed "appurtenances" within the scope of *N.H.R.S.A.*

§ 231-160. The lower court was not bound by the interpretation of § 231-160 by the Department of Transportation, as that construction is neither supported by nor in conformity with the express statutory languages. The lower court's own interpretation of the statute was not unduly restrictive.

The Appellant Public Service Company asserts a second issue that was neither raised nor litigated in the proceeding before the superior court. Allowing this issue to be raised on appeal would be error, as it would usurp the primary function of the superior court and require the Town of Rye to argue an issue not raised in the proceedings below and which did not serve as a basis for the lower court's decision. Even if, arguendo, the supreme court were to entertain this issue, the Appellant's argument is misleading as it mischaracterizes the proceedings below.

Contrary to the Appellant's assertions, the Appellee Town of Rye did not revoke or refuse to issue permits for utility installations under *N.H.R.S.A.* § 231-159, as the siren poles installed as part of a public emergency alerting system do not constitute utility facilities within the context of § 231:160. Furthermore, the Appellee's refusal to issue permits to the Appellant company was based on its objective determination that, pursuant to the proposed plan, town residents would be unable to be safely evacuated in the event of emergencies at Seabrook Station. Installation of siren poles would create a false sense of security among area residents. The Appellee's refusal to issue permits for the installation of said siren poles was a valid exercise of its well-recognized police powers. Finally, the one permit issued by the Appellee for three of

the poles in question was properly revoked because the Appellant had obtained the permit by submitting an application customarily used for the installation of ordinary utility poles, thus misleading the Appellee by concealing the fact that the pole license was being sought as part of the implementation of a nuclear emergency plan.

The third issue presented by the Appellant is also an improper attempt to raise on appeal that which formed no basis for the lower court's decision. Moreover, this last issue raised by the Appellant has no merit and improperly seeks to use these proceedings to expand the authorities and applicability of *N.H.R.S.A.* §§ 107-A et seq. and *N.H.R.S.A.* §§ 107-B et seq. beyond that granted or contemplated by the legislature and properly reserved to that body.

By raising this issue on Appeal, the Appellant, as recognized by the lower court, contends that in challenging the applicability of *N.H.R.S.A.* § 231-160 et seq., the Appellee is seeking to exercise local authority to prohibit the state from implementing a nuclear emergency response plan as required under *N.H.R.S.A.* §§ 107-A et seq. and *N.H.R.S.A.* §§ 107-B et seq. The Appellant cites authority for the proposition that municipalities cannot exercise veto power order the state's performance of its statutorily mandated functions. The lower court accurately exposed the flaw in the Appellant's argument in that the action taken by the Appellee is solely directed to the Appellant, Public Service Company, and not against the State of New Hampshire. Furthermore, as the lower court also explained, the state was not, in authorizing erection of the siren poles by the Appellant, exercising a statutorily mandated function. Rather, in so acting it was

relying on the presumed legislative authority of N.H.R.S.A. §§ 231-160 et seq. As the lower court correctly determined, this statute does not authorize erection of siren poles for this purpose.

ARGUMENT

I. THE TRIAL COURT WAS CORRECT AS A MATTER OF LAW IN RULING THAT N.H.R.S.A. § 231:160 DID NOT APPLY TO POLES WITH ATTACHED SIRENS TO BE USED AS PART OF A PUBLIC EMERGENCY SYSTEM.

The trial court was entirely correct in holding that *N.H.R.S.A.* § 231:160 (1982 & Cum. Supp. 1986) provides no authority for the erection of siren poles for a system of public notification, and that the licenses granted to the Appellant, the Public Service Company of New Hampshire by the Appellee, Town of Rye and by the State Department of Transportation for the erection of such siren poles were thus null and void.

First, the court correctly concluded that the poles at issue did not even fall within the provision of *N.H.R.S.A.* § 231:160 authorizing the installation of certain poles. That particular statutory provision specifically lists, and thereby manifests an intent to limit, the types of poles to be included within the scope of the statute. Noticeably absent from the list is any reference to poles which are sought to be installed as part of a public emergency system. The specific listing of types of poles covered, and the fact that no catchall category was created, reinforces the conclusion that the legislature clearly intended the list set forth in the statute to be exclusive.

Secondly, the court correctly applied the well-established principle of statutory construction that "the expression of one thing in a statute implies the exclusion of another." *In re Gamble*, 118 N.H. 771, 777 (1978). In other words, where things to which a statute refers are designated, "there is an inference that all omissions should be understood as exclusions." 2A J. Sutherland, *Statutes and Statutory Construction*, § 47.23 at 194 (C. Sands 4th ed. 1984); (footnotes omitted); *see also Silva v. Botsch*, 120 N.H. 600 (1980) (where state specifically listed reasons that might result in removal of a selectman/board member, removal for other than one of enumerated reasons was found to be violative of the statute); *Vaillancourt v. Concord General Mutual Insurance Co.*, 117 N.H. 48 (1977) (the fact that the legislature specifically excluded mobile homes and home trailers but not snowmobiles from the definition of "motor vehicle" supported the conclusion that a snowmobile was a motor vehicle within the statutory definition).

Properly applying that statutory maxim to the case before it, the lower court noted that in *N.H.R.S.A.* § 231:160 the legislature provided a very specific and limited enumeration of the uses for which poles may be erected on public highways. Moreover, the court indicated that the statute contains no terms indicating the nonexclusivity of the list, such as "such as," "like", or "including but not limited to." Undoubtedly, it would have been easy enough for the legislature to have amended the statute so as either specifically to include the erection of siren poles within the scope of authorized action, or to have left open the possibility of its inclusion by indicating that the list enumerating the uses for which

the poles might be erected was not exclusive. The lower court was correct in concluding that the legislature did not intend to permit the erection of poles by utility companies for any purpose for which the companies might see fit, but rather confined the statute's scope to only those purposes listed. Consequently, the licenses granted to the Appellant for the erection of siren poles for a system of public notification were granted without any statutory authority and thus were null and void. Any other conclusion would have been untenable in light of the rule of statutory construction and the current version of *N.H.R.S.A.* § 231:160.

Third, the lower court was justified in finding that the legislative history of *N.H.R.S.A.* § 231-160 further supported its conclusion. As the court noted, § 231:160 has been amended several times to accommodate technological innovations such as telephones, television, electric lights and electric power. With each amendment intended to update the statute the legislature has specifically listed a particular innovation as a permissible use for utility poles. Rather than using broad language to provide for the inclusion of future innovations or societal needs in general, the legislature has carefully tailored the statute to provide specifically for each new use. It is clearly beyond the role of the court to accommodate any other new uses where the legislature has intentionally refrained from doing so itself.

Even if, *arguendo*, the list were not intended by the legislature to be exclusive, the poles in the instant case and the use to which they are sought to be put still do not fall within the permissible scope of uses intended by *N.H.R.S.A.* § 231:160. The Appellant, Department of

Transportation, contends that the siren poles constitute utility poles, as § 231:150 applies to a broad range of utility-type facilities. This argument is ill conceived as it rests on what is claimed to be the general nature of the statute, while wholly disregarding the specificity of language employed by the legislature. A careful reading of the statute demonstrates that, with the exception of electric light poles, the poles designated in the statute are all utility poles and are all employed to provide direct service to the public. Each transmits some service to the homeowner. The siren poles, however, are clearly distinct from the utility poles in that the former do not provide any direct service to the public. Because of this important distinction, the Appellant, Department of Transportation's reliance on *King v. Town of Lyme*, 126 N.H. 279 (1985) and *Parker-Young Co. v. State*, 83 N.H. 551 (1929), is misplaced. *King* involved a conflict over an electric power line utility easement; *Parker-Young*, in turn, involved two utility companies competing to provide electric power service to the same area. Unlike the electric power poles in both *King* and *Parker-Young*, the siren poles in the instant action do not constitute utilities in even the most remote sense of the word. Although the Appellant contends that siren poles do relate to the transmission of electricity, that relationship is far too attenuated to warrant characterization of such poles as utility poles.

Furthermore, the Appellant's contention that the siren poles are merely utility poles to which sirens have been attached ignores the obvious and important differences between the two. Siren poles are distinct from utility poles not only in their significantly greater size but also in the purpose they serve. Unlike a utility pole, the

sole purpose of a siren pole is to provide a siren/public address system as part of an evacuation plan in the event of a nuclear accident at Seabrook Station.

The Appellant, Department of Transportation's attempt to characterize siren poles as structures within the meaning of *N.H.R.S.A.* § 231:160 is equally unavailing. The Department placed undue emphasis on what it perceived to be general language in the statutes describing the types of facilities subject to licensing. It is a well-established principle that unless an act as a whole indicates a different purpose, the general words which follow specific words in an enumeration are construed to embrace only objects similar in nature to those enumerated by the preceding specific words. *Hackett v. Gale,* 104 N.H. 90, 92 (1960) (where specific, learned professions were listed in a zoning ordinance allowing for accessory use of residences, the term "others" which followed the list did not include a real estate brokerage which was regarded as a business rather than a profession); *State v. Small,* 99 N.H. 349 (1955). In the present action, the term "structures" which follows an enumeration of specific types of utility poles must be construed with the same specificity and be confined to include only those structures other than poles which are utilized by the same, specifically enumerated utility facilities. In this sense, siren poles cannot logically be characterized as "structures" included in § 231:160.

Finally, as noted by the lower court, the sirens can hardly be termed "appurtenances" within the scope of *N.H.R.S.A.* § 231:160. Unlike appurtenances, which refer to subordinate or adjunct parts, the sirens, which themselves are about six feet tall and weigh about 500 pounds

each, are the primary and most important features of the poles. The sirens are essential to the sole purpose of the poles in providing a siren/public address system. Any attempt to minimize their importance by relegating them to the status of appurtenances cannot be condoned.

The Appellant, Public Service Company, further contends that the lower court erred in disregarding the interpretation of *N.H.R.S.A.* § 231:160 given to it by the Department of Transportation, in which the Department considered the siren poles to be analogous to poles used for transmission lines. The Appellant cites the case of *N.H. Retirement System v. Sununu*, 126 N.H. 104 (1985) for the proposition that an agency's interpretation of a statute is entitled to substantial deference. The Appellant, however, fails to point out that the *Sununu* court also recognized that a long-standing administrative statutory interpretation is irrelevant if such interpretation is in conflict with the express statutory language. Likewise, where an agency offers a construction which is unsupported by the language of the statute, there is no need for the legislature to have amended the provision, as the statute speaks for itself and the error is apparent without need for such action. *See Hambry v. Adams*, 117 N.H. 606 (1977) (the interpretation given to a statute by the Department of Unemployment Security was not found to conform to legislative intent where the Department did not show any statutory language which would support its conclusion). The rule that, where a statute is of doubtful meaning, the long-standing practical and plausible interpretation applied by the agency charged with its implementation without any legislative interference is evidence that the administrative construction is in accordance with

legislative intent, does not apply where, as here, the meaning of the statute in issue is not in doubt. *See State Employees' Association of New Hampshire, Inc. v. State,* 127 N.H. 565 (1986) (even though some legislators had an intent that ran counter to the statutory language actually enacted, that would not create the uncertainty of statutory meaning necessary to justify an inquiry beyond the face of the statute itself). Furthermore, while an administrative interpretation of a statute may be entitled to deference, it is not ordinarily controlling. *N.H. Department of Revenue Administration v. Public Employment Labor Relations Board,* 117 N.H. 976, 977 (1977).

In the instant action, the interpretation of N.H.R.S.A. § 231:160 by the Department of Transportation is not entitled to substantial deference. The Department's interpretation, in which it considered the siren poles to be analogous to electric power poles or structures with sirens as attachments and appurtenances within the meaning of the statute, is neither supported by nor in conformity with the express statutory language. Rather, the language of the statute which expressly enumerates the uses for which poles may be erected on public highways, fails to mention poles to be installed as part of a public emergency system. Furthermore, no catch-all category exists pursuant to which the siren poles could be construed to be included. Thus, there is no reason to believe that the list is other than exclusive.

The Department's interpretation of the statute – allowing the poles at issue to be treated as analogous to electric power poles or structures with sirens as attachments and appurtenances – ignores the obvious and important differences between the poles. As has already

been discussed, the siren poles provide no direct service to the public, are significantly taller than utility poles, and serve only to provide a siren/public address system in the event of a nuclear accident. The sirens themselves can hardly be considered mere attachments or appurtenances, as they themselves are the most essential feature of the pole in providing a notification system.

In light of the foregoing, the Appellant's argument that the lower court erred in failing to give due regard to the Department of Transportation's interpretation of the statute is rendered ineffectual. Given the express enumerations set forth in the statute, the meaning of the statute at issue is anything but doubtful so as to require a court to resort to an agency's interpretation. The scope of uses authorized is explicitly established by the language of the statute. The interpretation given to it by the Department is clearly in conflict with such language and is unsupported by any fair reading of the statute. Consequently, the court was correct in applying its own interpretation of the statute as there is no evidence that the Department's construction of the statute in equating siren poles with utility poles is compatible with the legislative intent or is otherwise controlling. As the Department's interpretation is clearly unreasonable, it may be set aside. *State Employees' Association of New Hampshire, Inc. v. State. supra,* demonstrates that even an agency's long-standing interpretation may be overridden where it is shown to be in conflict with the statute it purports to interpret.

Public Service Company of New Hampshire also contends that the lower court adhered to an unduly restrictive scope for § 231:160 and calls for a more flexible

application of the statute as a whole. However, the specific language of the statute and its legislative history requires a restrictive reading, justifies the lower court's distinction between siren and electric or other utility poles, and supports its exclusion of siren poles from the class of utility facilities which may be installed on public highways.

II. APPELLANT'S SECOND ARGUMENT IMPROPERLY ATTEMPTS TO RAISE ON APPEAL AN ISSUE NOT RAISED OR LITIGATED IN THE PROCEEDINGS BELOW AND SEVERELY MISCHARACTERIZES THE PROCEEDINGS BELOW.

It is a well-established rule of appellate procedure in New Hampshire that the supreme court will not consider a question or argument presented for the first time on appeal. Thus, issues or questions not raised at trial cannot be raised or relied upon on appeal to the supreme court. *American Legion Post No. 94 v. Jefferson Insurance Co. of New York*, 125 N.H. 758 (1984); *Daboul v. Town of Hampton*, 124 N.H. 307 (1983); *Nowell v. Union Mutual Fire Ins. Co.*, 119 N.H. 855 (1979); *Sperl v. Sperl*, 119 N.H. 818 (1979); *Hauser v. Calawa*, 116 N.H. 676 (1976).

The Appellant, Public Service Company, raises an issue in its question presented number two which was neither raised nor litigated in the proceeding before the superior court. Allowing this question to be raised now on appeal would be improper, as it would usurp the primary function of the superior court and require the Town of Rye to argue an issue not raised in the proceeding below and which did not serve as a basis for the

lower court's decision. Adherence to proper appellate procedure dictates that the supreme court not consider this question raised for the first time on appeal. Even if, *arguendo*, the supreme court did entertain this question, it is clear that the Appellant's second argument is misleading, as it mischaracterizes the proceedings below.

First, contrary to the Appellant's assertion, the Appellee Town of Rye did not "revoke or refuse to issue permits for utility installations under *N.H.R.S.A.* §§ 231:159 et seq. As has already been established, the siren poles at issue in the present case do not constitute utility installations within the context of *N.H.R.S.A.* §§ 231:160 et seq. A careful reading of § 231:160 demonstrates that the statute does not apply to siren poles installed as part of a public alerting and notification system at Seabrook Station. The poles in question are distinct from customary utility poles in that the former are approximately 25-30 feet taller, carry no lines for the transmission of utilities, provide no direct service to the public, and have affixed to them a six-foot, 500-pound siren. Furthermore, the poles at issue cannot fairly be characterized as structures with sirens as attachments or appurtenances within the language of § 231:160. As the siren poles do not on any basis qualify as utility poles, structures, or facilities, it can hardly be said that the Appellee revoked or refused to issue permits for utility installations under *N.H.R.S.A.* §§ 231:159 et seq. Such an argument completely misconstrues the Appellee's actions in regard to the Appellant's application.

Second, the Appellee's refusal to issue permits to the Appellant Company was based on its objective determination that, pursuant to the Appellee's plan, town

residents could not safely be evacuated in the event of emergencies at the Seabrook station in instances of even moderate releases of radiation. Also, the proposed installation of siren poles would create a false sense of safety, and mass hysteria among the town residents would likely result in the event of an emergency when the ineffectiveness of the proposed evacuation plan would become apparent.

The Appellee's refusal to issue permits for the installation of said poles and sirens as part of a nuclear emergency response plan was clearly valid as an exercise of its well-recognized police powers. Under *N.H.R.S.A.* § 31:39, towns are afforded the authority to make bylaws for a number of purposes, including the carrying on of their "prudential affairs." This provision gives to towns and municipalities the authority to exercise police powers in the general areas of public health, safety and welfare. *Town of Freedom v. Gillespie,* 120 N.H. 576, 579 (1980) (town ordinance requiring that septic tanks be constructed at least 125 feet from any body of water upheld on basis of the town's police powers); *Piper v. Meredith,* 110 N.H. 291, 298 (1970) (town's exercise of its police powers in an ordinance regulating the height of buildings within the town must be upheld if supported by any fair reason; *State v. Zetterberg,* 109 N.H. 126, 129 (1968) (ordinance enacted by the Town of Rye regulating surfing in the waters off the town's shore was a proper exercise of the town's police powers in the area of public health and safety). In light of the false sense of security likely to have been engendered by the erection of poles and sirens, the Appellee reasonably concluded that its approval of the installation system could result in posing a serious

threat to the life, health, and property interests of its residents in the event of a nuclear accident.

New Hampshire case law clearly indicates that, under its police powers, a municipality has broad authority to take action in matters affecting the public health, safety, and welfare. In view of these established powers, the Appellee's refusal to approve the installation of poles and sirens within the municipality must be upheld as an appropriate exercise of this power. *See Piane v. Town of Conway*, 118 N.H. 883, 884 (1978) (town ordinance restricting number of street vendors in heavy traffic areas proper exercise of police powers); *Town of Plainfield v. Hood*, 108 N.H. 502, 506 (1968) (ordinance restricting number and locale of mobile homes within town valid as protecting public health, safety, and welfare); *Town of Deering ex rel. Bittenbender v. Tibbetts*, 105 N.H. 481, 484 (1964) (town ordinance restricting construction of buildings near town common valid exercise of police power in view of purpose of preserving historic buildings and protecting general welfare and prosperity of town).

The one permit issued by the Appellee for three of the poles in question was properly revoked because the Appellant Public Service Company had obtained the permit by submitting an application customarily used for the installation of ordinary utility poles, thus misleading the Appellee by concealing the fact that the pole license was being sought as part of the implementation of a nuclear emergency plan. The Appellant failed to follow the proper procedure in that such license applications are to be submitted to the Board of Selectmen. Instead, the Appellant improperly submitted the application to the Town Clerk, thus preventing proper consideration from

being given to the license application. Knowing that the Town of Rye had repeatedly, consistently and unequivocally objected to the installation of 60-foot poles with sirens, the Appellant submitted its pole license application without any cover letter or explanation as to the purpose behind the application. Obviously, the Appellant intended to conceal its purpose in seeking the license. The issuance of this license, based upon the Appellant's deceit, was without force and effect, and thus the Town of Rye had every right to revoke that which it issued in error and under circumstances for which it found Public Service Company of New Hampshire culpable.

The Appellee's revocation of the license, based as it was upon the health and safety of its residents, was entirely proper. 64 *C.J.S.*, "Municipal Corporations" § 1740(3) (1950). Clearly, the municipality's police powers in the area of public health and safety take precedence over the Appellant's interests as a licensee. The predominance of the local health and safety over a utility's interest as a licensee is well illustrated by the established rule that utilities with properly licensed facilities (i.e. lines, poles, etc.) located on or beneath public property are required to relocate such facilities at their own expense when the public health and safety require. *Manchester Gas Co. v. Griffin Construction Co.*, 119 N.H. 179 (1979); Opinion of Justices. 101 N.H. 527 (1957).

In the present case, the Appellee's actions in revoking the Appellant's license were based on the Appellee's belief that the erection of such poles on town property as part of the implementation of a nuclear emergency response plan was not in the best interests of its residents. The municipality's interest in promoting the public

health and safety clearly takes precedence over any interest the Appellant might have had as a licensee. Under the exercise of its police powers, therefore, the Appellee was empowered to revoke the Appellant's license. The Appellee did not revoke or refuse to issue the permits merely because it did not want such installations in the Town or solely because it opposed the project with which the installations were associated, as the Appellant contends.

III. APPELLANT'S ASSERTION THAT BY CHALLENGING THE APPLICABILITY OF *N.H.R.S.A.* § 231:160 ET SEQ., THE APPELLEE SOUGHT TO EXERCISE LOCAL AUTHORITY TO PROHIBIT THE STATE FROM IMPLEMENTING A NUCLEAR EMERGENCY RESPONSE PLAN IS CLEARLY ERRONEOUS AND IS AN IMPROPER ATTEMPT TO RAISE ON APPEAL AN ISSUE WHICH FORMED NO BASIS FOR THE LOWER COURT'S DECISION.

The third issue presented by the Appellant Public Service Company is also an improper attempt to raise on appeal that which formed no basis for the lower court's decision. The Appellant itself recognized that the lower court found for the Appellee on the ground that the poles in question were not within the class of installations authorized, and therefore, the licenses for the poles had been issued without statutory authority and were null and void. (Attachment to Notice of Appeal, Record pp. 6-7). The third issue raised by the Appellant has no merit and improperly seeks to use these proceedings to expand the authorities and applicability of *N.H.R.S.A.* §§ 107-A et seq. and *N.H.R.S.A.* §§ 107-B et seq. beyond that granted or contemplated by the Legislature and properly reserved to that body.

In trying to raise this specific issue on appeal, the Appellant, as properly recognized by the lower court, contends that by challenging the applicability of *N.H.R.S.A.* §§ 231-160 et seq., the Appellee Town of Rye is seeking to exercise local authority to prohibit the state from implementing a nuclear emergency response plan as required under *N.H.R.S.A.* §§ 107-A et seq. and *N.H.R.S.A.* §§ 107-B et seq.

The lower court correctly observed that the Appellant Public Service Company's reliance on the asserted applicability or *Vernet v. Exeter*, 128 N.H. (December 30, 1986), to the instant action is clearly misplaced. Appellant cited *Vernet* for the proposition that municipalities cannot exercise veto power over the state's performance of its statutorily mandated functions. The lower court exposed the flaw in the Appellant's argument in that the action taken by the Appellee is solely against the Appellant, Public Service Company of New Hampshire, and not against the State of New Hampshire. As it is the Appellant company, rather than the state, which has taken the action which the Appellee seeks to enjoin, *Vernet* is inapplicable to the instant facts. As the lower court also explained, the State Department of Public Works and Highway (now the Department of Transportation), in authorizing erection of the siren poles by the Appellant, was not exercising a statutorily mandated function. Rather in so acting it was relying on the presumed legislative authority of *N.H.R.S.A.* § 231:160 et seq. which as the lower court correctly determined, does not authorize the erection of siren poles for this purpose.

CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's decision.

Oral argument will be presented by J.P. Nadeau who respectfully requests 20 minutes.

Respectfully submitted,
Town of Rye
By its Attorneys
J.P. Nadeau, Esquire

Dated: September 2, 1987
By: /s/ J.P. Nadeau

J.P. Nadeau, Esquire
Attorney for the Appellee
Town of Rye
Nadeau Professional Offices
507 State Street
Portsmouth, NH 03801
(603) 436-0110

CERTIFICATE OF SERVICE

I hereby certify that I have on this 2nd day of September 1987 forwarded a copy of the foregoing to Margaret H. Nelson, Esquire, Michael J. Walls, Assistant Attorney General, Robert A. Backus, Esquire and Raymond Taylor, Clerk, Rockingham County Superior Court (2 copies)

/s/ J.P. Nadeau
J.P. Nadeau

APPENDIX B TO
BRIEF OF PUBLIC SERVICE COMPANY
OF NEW HAMPSHIRE IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO
THE NEW HAMPSHIRE SUPREME COURT

THE STATE OF NEW HAMPSHIRE
SUPREME COURT

1987 TERM
AUGUST SESSION

No. 87-062

Town of Rye and Town of Hampton Falls

v.

Public Service Company of New Hampshire
and the State of New Hampshire
Department of Transportation

MOTION FOR RECONSIDERATION

J.P. Nadeau, Esquire
Attorney for the Town
Of Rye
Nadeau Professional Offices
507 State Street
Portsmouth, N.H. 03801
(603) 436-0110

Pursuant to *N.H. Sup. Ct. R.* 22, the Town of Rye, Appellee in these proceedings, respectfully moves this Honorable Court to reconsider its decision of March 29, 1988. The Town of Rye respectfully suggests that the court has overlooked and misapprehended several points

made in the proceedings below, which points are more particularly described within the body of this Motion.

STATEMENT OF FACTS

The Public Service Company of New Hampshire (hereinafter PSCNH) is a private electric utility company and controlling partner in the construction of the Seabrook Nuclear Power Station. On or about November 7, 1983, PSCNH contacted the Town of Rye regarding PSCNH's proposal to install a public alerting system. From the time of the initial proposal to the present, the Town of Rye has consistently opposed the proposal.

On July 9, 1984, PSCNH submitted an application for a pole license to the town clerk of Rye. The application was submitted with no cover letter and with no explanation of the purpose to which the poles would be put (Tr. 22, 27, 37, 101) (all references to transcript are to the hearing of November 13, 1986). Subsequently, a separate application was submitted to the State of New Hampshire for poles with attached sirens to be placed on various state-maintained roads in the towns of Rye and Hampton Falls.

In September 1984, an official of the Appellee Town signed the Appellant's pole license application after it had been routinely processed and the State Department of Transportation gave its permission to the Appellant Company to install the poles. On November 7, 1985, the Appellant Company began installing four poles with attached sirens on state right-of-ways within the municipality and installed two of the three remaining poles on municipal property. The poles are approximately 60 feet

in height (as opposed to a utility pole of 35 feet in height) (Tr. at 90, 109-10) and affixed to the top of each pole is a 6-foot, 500-pound siren/public address system (Tr. 108, Appendix to Appeal 113) (references to Appendix are to Appendix to Notice of Appeal). The Town of Rye, on November 20, 1985, issued a cease and desist order against the Appellant Company's actions in installing the poles and revoked the pole license which had been issued by the Appellee to the Appellant (Tr. 47). The Appellee also advised the Appellant that the installation of any poles for the purpose of attaching sirens to the poles was unacceptable to the Appellee.

After the Appellant refused to obey the cease and desist order issued by the Appellee, the Appellee instituted an action for declaratory relief against the Appellant Company (Appendix to Appeal at 17-19). Specifically, the Appellee sought an order allowing it to revoke the pole license it had granted to the Appellant to install poles on town-maintained rights-of-way and also sought removal of certain poles installed within the town limits on state-maintained highways under licenses issued by the state. The Town of Hampton Falls was permitted to intervene to similarly seek removal of poles located in the town on state-maintained highways. Following a hearing on November 26, 1986, the court determined that the state of New Hampshire Department of Transportation (DOT) was a necessary party for the resolution of the dispute and ordered the DOT to file responsive pleadings (Appendix to Appeal at 87-91, 112).

By order dated January 20, 1987, the superior court, Walter L. Murphy presiding, ordered removal of the

poles and the siren/public address systems at the Appellant's expense within 30 days of the order (Appendix of Appeal at 112-18). The sole ground on which the superior court justice based his decision was the fact that the poles and sirens in question were found not to be in the class of utility facilities, installations, or structures within the meaning of *N.H. Rev. Stat. Ann.* §§ 231-160 et seq. In ruling in favor of the Appellee, the trial court held that the poles in question were not "telegraph, television, telephone, electric light and power poles" within the meaning of the statute. The trial court noted the exclusivity of the list of authorized uses enumerated in § 231:160 and the fact that the use of poles as part of a public emergency system was not included within the statute's coverage. Thus, the court held that the licenses granted by the Town of Rye and by the State Department of Transportation for the erection of poles for a system of public notification were granted without statutory authority and were, therefore, null and void.

On appeal, the Supreme Court of New Hampshire reversed the judgment of the trial court.

ARGUMENT

I. THE COURT HAS MISAPPREHENDED POINTS OF LAW AND FACT MADE BY THE TOWN OF RYE AND IMPROPERLY HELD THAT THE LICENSES WERE GRANTED PURSUANT TO PROPER STATUTORY AUTHORITY AND THAT THE POLES ERECTED SHOULD NOT BE REMOVED.

The Town of Rye respectfully suggests that the court has misapprehended certain of its points regarding the

lack of authority to issue the pole licenses at issue. The Town moves the Court to reconsider these points.

This Court has held in this case that *N.H. Rev. Stat. Ann.* § 231:161, VI, "made it unnecessary for our legislature to amend the statute to specifically permit siren poles" (Decision of the court, March 29, 1988). The court has also found that sirens are "attachments" within the meaning of *N.H.R.S.A.* §§ 231:160 and 231:161, VI. The Town requests reconsideration of each of these findings.

N.H.R.S.A. § 231:160 does authorize the installation of certain poles. Yet, that provision specifically lists the types of poles which are included within its terms. The list omits reference to any type of public emergency system. Clearly, this function does not fall within the scope of the statute. Moreover, "the expression of one thing in a statute implies the exclusion of another." *In re Gamble,* 118 N.H. 771, 777 (1978). Had the legislature wished to include this function within the statute's terms, it would have done so.

The "attachments" mentioned in *N.H.R.S.A.* § 231:160 relate only to the enumerated, permitted poles. Where "public emergency system" poles are not permitted, it is improper to assert that such functions may be accomplished pursuant to the "attachment" provision. Unless an act specifically indicates a different purpose, general words following the specific words in an enumeration are properly construed to include only objects similar to those enumerated. *Hachett v. Gale,* 104 N.H. 90, 92 (1960). Where the "emergency alert" function is not included in the enumeration of permitted poles, it cannot be later

inserted through construction of the "attachment" provision.

It is clear that the "alert" function was not intended to be included in the enumeration of permitted poles. Importantly, as was noted by the trial court, the statute contains no words or phrases which might indicate the nonexclusivity of the list, such as "such as," "like," or "including, but not limited to." Had the legislature desired the statute to be so interpreted, it would have so indicated.

Instead, the use of these poles for emergency alert systems was not included by the legislature. The legislature has considered several technological developments – including telephones and electric power – and amended the statute to accommodate each of these new requirements. However, the legislature has refused to specifically provide for public warning systems in this statute. It has thus made clear the fact that the statute does not address such uses.

By its March 29, decision, the court would add such a function to the list of permitted poles. It thus would seek to create new laws and thus to legislate. In fact, such an act of legislation would be in contravention of the intent of the legislature. By doing so, it would violate an important canon of constitutional law, that of separation of powers. This canon is set out in this state's Bill of Rights:

> In the government of this state, the three essential powers thereof, to wit, the legislative, executive and judicial, ought to be kept as separate from, and independent of, each other, as the nature of a free government will admit, or as in consistent with that chain of connection that binds the whole fabric of the

constitution in one dissoluble bond of union and amity.

N.H. Const. pt. 1, art. 37.

It is well-settled that "(t)he separation of powers requirement of the constitution is violated by an improper imposition upon one branch of constitutional duties belonging to another or an encroachment by one branch upon a constitutional function of another." *State v. La France,* 124 N.H. 171 (1983). No court may alter a legislature's intent by its own acts of legislation.

Even if, *arguendo,* the list included in the statute were not intended to be exclusive, the poles in the case at bar still do not fall within the scope of uses permitted by *N.H.R.S.A.* § 231:160. With the exception of electric light poles, each pole enumerated by the act transmits some service to homeowners. The siren poles provide no such service. Siren poles, thus, do not fall within the purview of legislative intent. The court may not tread upon the providence of the legislature by creating law contrary to the legislative intent.

II. THE COURT HAS MISAPPREHENDED THE TOWN'S POINTS REGARDING THE ROLE OF THE COMMUNITY WITH RESPECT TO THE EVACUATION PLAN.

The decision of the court refers to local attempts to "veto" evacuation plans developed by the civil defense agency. It also declares an inability on the part of the communities "to prohibit either cooperation by selectmen with radiological emergency response planning . . . or construction . . . of any installations necessary for the

implementation of a RERP" (Decision of the court, March 29, 1988 at 4). Because the court has misunderstood the activities of the community, the Town of Rye respectfully moves the court to reconsider its holdings.

The Town has never attempted to assert any "veto power" or absolute control over the existence of an evacuation plan. The Town's objection to the plan is directed against the Public Service Company of New Hampshire and not against the State of New Hampshire. The Town of Rye has objected to the specific plan offered by PSCNH, on the basis of its obligations to protect its citizens. The Town is concerned with such matters as a safe and orderly traffic flow in the event of evacuation and the provision of emergency services to those injured, perhaps in traffic, while in the process of evacuation.

Contrary to the observation of the court, the Town has consistently articulated such safety-related reasons for its opposition (see, for example, Tr. 28-29 and Brief on Appeal, Town of Rye, at 19). The Town maintains that the above-stated goals fall within the authority of local communities and that the Town may properly seek to participate in the planning process by the protection of those goals. *Public Service Company of New Hampshire v. West Newbury*, 835 F.2d 380 (1st Cir. 1987); in fact, absent any affirmative interference amounting to a regulating of nuclear power, the Town may refuse cooperation with a particular proposal. *Citizens For An Orderly Energy Policy, Inc. v. Suffolk County*, 604 F. Supp. 1084 (E.D.N.Y. 1985). No state statute denies communities this important right of participation in the nuclear planning process. The Town further maintains that, based on its misapprehension of the above facts, the court incorrectly concluded

that no safety reasons existed to authorize a license revocation or the denial of an application for a license.

CONCLUSION

Based on the foregoing Argument, the Town of Rye respectfully suggests that the court has misapprehended and/or overlooked points of fact and of law which are crucial to the disposition of this case; the Town moves the court for reconsideration of this matter.

Respectfully submitted,

/s/ J.P. Nadeau
J.P. Nadeau
Attorney for Appellee, the
Town of Rye
Nadeau Professional Offices
507 State Street
Portsmouth, N.H. 03801

CERTIFICATE OF SERVICE

I hereby certify that I have on this eighth day of April, 1988, mailed, first class postage pre-paid, a copy of the foregoing Motion for Reconsideration and a notice of filing to Margaret H. Nelson, Michael J. Walls, Assistant Attorney General, Robert A. Backus, and Raymond Taylor, Clerk, Rockingham County Superior Court. These materials have been hand-delivered to Ralph Wood, Clerk, New Hampshire Supreme Court.

/s/ J.P. Nadeau
J.P. Nadeau

(3)

88-621

NO. _____

Supreme Court, U.S.
FILED
NOV 10 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1988

Town of Rye, New Hampshire,
Petitioner

v.

Public Service Company of New Hampshire,
The State of New Hampshire
Department of Transportation and
Town of Hampton Falls, New Hampshire
Respondents

On Writ of Certiorari to the Supreme Court of New Hampshire

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THE STATE OF NEW HAMPSHIRE
DEPARTMENT OF TRANSPORTATION
BY ITS ATTORNEYS

STEPHEN E. MERRILL
Attorney General

MICHAEL J. WALLS*
Assistant Attorney General

Office of Attorney General
State House Annex
25 Capitol Street
Concord, New Hampshire 03301
603-271-3675

Counsel for Respondent
*Counsel of Record

15 pp

QUESTION PRESENTED FOR REVIEW

May a locality refuse to accede to the installation of a particular emergency warning system proffered by a nuclear plant operator as a part of that plant's proposed Radiological Emergency Response Plan?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

STATEMENT OF THE CASE 2

REASONS WHY THE PETITION SHOULD BE DENIED 6

I. THIS CASE INVOLVES NO SUBSTANTIAL FEDERAL QUESTION 6

II. THE DECISION OF THE NEW HAMPSHIRE SUPREME COURT RESTS UPON ADEQUATE AND INDEPENDENT STATE GROUNDS 8

III. THE NEW HAMPSHIRE SUPREME COURT'S DECISION DOES NOT CONFLICT WITH ANY FEDERAL RIGHT OR ANY PRIOR FEDERAL COURT DECISION 8

CONCLUSION 10

TABLE OF AUTHORITIES

CASES Page

Citizens for an Orderly Energy Policy v. Suffolk County 604 F.Supp. 1084 (E.D.N.Y. 1985), aff'd. 813 F.2d 570 (1987) 9

Fox Film Corp. v. Muller, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935).....8

Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983) 10

Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984) 9

Vernet v. Town of Exeter, 129 N.H. 34, 523 A.2d 48 (1986) 6,8

STATUTES

N.H. Rev. Stat. Ann. §231:160 *et seq.*.....passim

N.H. Rev. Stat. Ann. §231:160.....passim

N.H. Rev. Stat. Ann. §231:161 2

N.H. Rev. Stat. Ann. §231:161,I(a) 2

N.H. Rev. Stat. Ann. §231:161,I(c)(supp) 3

N.H. Rev. Stat. Ann. §231:161,VI 5

28 U.S.C. §1257(3) 10

42 U.S.C. §2011 et seq.....7

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

Town of Rye, New Hampshire
Petitioner

v.

Public Service Company of New Hampshire,
The State of New Hampshire
Department of Transportation and
Town of Hampton Falls, New Hampshire
Respondents

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF NEW HAMPSHIRE

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The State of New Hampshire Department of Transportation, a respondent herein, respectfully requests that this Court deny the Petition for Writ of Certiorari seeking review of the New Hampshire Supreme Court's Opinion in this case. That Opinion is reported at 130 N.H. 365, 540 A.2d 1233 (1988) and is reproduced at pp. 38-50 of the Petition in the Appendix.

STATEMENT OF THE CASE

Respondent Public Service Company of New Hampshire (hereinafter "PSNH") is a public utility and one of the joint owners of the Seabrook Nuclear Generating Station (hereinafter "Seabrook Station") in Seabrook, New Hampshire. Respondent State of New Hampshire Department of Transportation (hereinafter "NHDOT") is the state agency responsible for the design, construction, maintenance, and operation of the interstate and state highway systems in New Hampshire.

The Town of Rye, New Hampshire and the Town of Hampton Falls, New Hampshire are municipalities located within a ten mile radius of Seabrook Station and are therefore within the emergency planning zone for which PSNH has prepared a Radiological Emergency Response Plan (sometimes hereinafter "RERP") as required by federal regulation and state law. As a part of its Radiological Emergency Response Plan for Seabrook Station, PSNH developed a public alerting and notification system consisting of sirens placed on utility poles to be located in and along public highways in several communities within the emergency planning zone, including the Towns of Rye and Hampton Falls.

New Hampshire law authorizes and establishes a procedure for licensing the placement of utility poles and attachments and appurtenances thereto in public highways. See generally, N.H. Rev. Stat. Ann. §231:160 *et seq.* N.H. Rev. Stat. Ann. §231:160 provides, *inter alia:*

> Telegraph, television, telephone, electric light and electric power poles and structures and underground conduits and cables, with their respective attachments and appurtenances may be erected, installed and maintained in any public highways ... .

N.H. Rev. Stat. Ann. §231:161 states that petitions for pole licenses concerning town-maintained highways shall be addressed to the selectmen of the town in which such highway is located. N.H. Rev. Stat. Ann. §231:161,I(a). Exclusive jurisdiction over the disposition of utility pole license petitions in

State-maintained highways is delegated to the New Hampshire Commissioner of Transportation. N.H. Rev. Stat. Ann. §231:161,I(c)(supp).

In July 1984, PSNH submitted pole license applications pursuant to N.H. Rev. Stat. Ann. §231:160 *et seq.* for the installation of utility poles with attached sirens on roads maintained by the Town of Rye and NHDOT. In September, 1984 both petitioner Town of Rye and respondent NHDOT granted the licenses and PSNH proceeded to install the siren poles in accordance with the approvals it had received.

Thereafter, the Town of Rye wrote a letter to PSNH purporting to revoke the pole licenses which had been previously issued. The Town ordered PSNH to cease and desist from any further installation of poles in Rye and to remove any poles that had been installed, including those on State highways.

To enforce its order, the Town of Rye, on January 20, 1986, filed a Petition for Declaratory Judgment with prayers for specific performance against PSNH in the Superior Court of the State of New Hampshire, seeking the removal of the siren poles that had been installed within the limits of both town and State highways. The gravamen of the complaint was that N.H. Rev. Stat. Ann. §231:160, the statute authorizing the erection of utility devices in public highways, did not specifically include within its terms the specialized siren poles installed by PSNH and further that the installation of the siren poles required approval of the town.

Subsequently, the Town of Hampton Falls moved to join the Petition for Declaratory Judgment brought by the Town of Rye. It alleged that PSNH had installed poles and warning sirens within its municipal limits contrary to the wishes of the Town as expressed in a 1984 Town meeting vote and also contrary to the express order of the Hampton Falls Selectmen.

On March 31, 1986, PSNH filed its Answer to Petition for Declaratory Judgment. PSNH responded by stating that the siren poles were required by federal law in order for Seabrook Station to receive an operating license and that they were an

integral part of the Radiological Emergency Response Plan formulated by the State of New Hampshire. In addition, PSNH answered that the Town had no authority to regulate the installation of any utility poles located within State-maintained highways and that the Town of Rye had improperly attempted to revoke the utility pole license previously issued by it.

In response to the allegations set forth in the Motion of Hampton Falls to join the Petition for Declaratory Judgment, PSNH responded that it had received permission from the State of New Hampshire to install the poles and sirens on State highways, pursuant to N.H. Rev. Stat. Ann. §231:160 *et seq.* and that further permission from the Town was not required.

On November 13, 1986, a hearing was held before the Superior Court sitting in Rockingham County, New Hampshire. In an Order dated November 26, 1986, the trial court identified the ultimate issue to be determined as "whether RSA 231:160 et seq. authorizes the town and/or State to issue pole licenses for purposes related to this siren warning system." The Superior Court determined that the New Hampshire Department of Transportation was a necessary party to the proceedings and directed the issuance of Orders of Notice requiring NHDOT to file a formal answer to the Petition. (See Appendix to Petition, pp. 22-26).

On December 16, 1986, NHDOT filed an Answer asserting that the licenses which were the subject of the litigation were authorized by N.H. Rev. Stat. Ann. §231:160 and that the Commissioner of Transportation had exclusive jurisdiction over the disposition of such licenses for utility devices located within State-maintained highways.

On January 20, 1987, the Superior Court held that N.H. Rev. Stat. Ann. §231:160 was not broad enough to authorize the installation of the siren poles within public highways and

that the licenses granted to PSNH by the Town of Rye and NHDOT were therefore null and void. (See Appendix to Petition, pp. 27-37).

On appeal, the New Hampshire Supreme Court considered the following questions:

1. Are utility poles carrying sirens, which are part of a warning system required by Federal Regulation for Seabrook Station, within the class of electric poles, structures and appurtenances entitled to placement in public ways under RSA 231:160?

2. May selectmen revoke or refuse to issue permits for utility installations under RSA 231:159 et seq. merely because they do not want such installations in the town or because they oppose the project with which the installations are associated?

3. Does a vote of a town forbidding cooperation with radiological emergency response planning for Seabrook Station prohibit the State from permitting associated utility installations in State highways within a town?

On March 29, 1988 the Supreme Court of New Hampshire reversed the judgment of the trial court. Its opinion addressed all three questions presented above. (See Appendix to Petition, pp. 38-50). The New Hampshire Supreme Court held that the warning sirens were "attachments" within the meaning of N.H. Rev. Stat. Ann. §231:160 and §231:161,VI and therefore the trial court had erred in ruling that the pole licenses had been granted without statutory authority. In addressing the second question presented above, the New Hampshire Supreme Court stated that:

> The Selectmen of Rye lack authority to revoke the licenses they granted to PSNH, or to deny applications for licenses to erect three siren poles on town-maintained highways for any reason other than a reason relating to "the safe, free and convenient use for public travel of the highway ...," which is the criterion for the exercise of the selectmen's authority

> under the statute; and no safety-based justification for the revocation was articulated by the town. RSA 231:168.

Appendix to Petition, p. 47.

In addressing question three, *supra*, concerning the efficacy of a town vote forbidding cooperation with the Radiological Emergency Response Plan for Seabrook Station, the New Hampshire Supreme Court relied upon its previous decision in *Vernet v. Town of Exeter*, 129 N.H. 34, 523 A.2d 48 (1986), and stated that:

> Similarly, RSA 231:159 *et seq.* do not give a town veto power over the erection of siren poles, pursuant to a RERP. Hampton Falls lacked authority to prohibit either cooperation by selectmen with radiological emergency response planning for Seabrook Station, or construction by PSNH on State highways in Hampton Falls of any installations necessary for the implementation of a RERP.

Appendix to Petition, p. 48.

On April 21, 1988, the New Hampshire Supreme Court denied the Town of Rye's Motion for Reconsideration. (See Appendix to Petition, p. 51).

REASONS WHY THE PETITION SHOULD BE DENIED

I. THIS CASE INVOLVES NO SUBSTANTIAL FEDERAL QUESTION.

The question presented for review by the petitioner is whether a municipality may refuse to permit the installation of an emergency warning system proposed by a nuclear plant operator as a part of its radiological emergency response plan. This issue, however, purportedly based on federal law, was never actively raised by the petitioner, was never litigated by the parties, and was not decided by the New Hampshire Supreme Court in the case below.

This case has been, from the start, a state law case. The primary focus of both the petitioner and the State courts has been whether the PSNH siren poles were properly licensed under State law. As the trial court noted in its order of January 20, 1987:

> The ultimate issue to be determined is whether R.S.A. 231:160 *et seq.* authorizes the towns and/or the State to issue pole licenses for the erection of poles for purposes related solely to this siren warning system.

Appendix to Petition, page 30.

The exclusively state law character of the case carried over during the appeal to the New Hampshire Supreme Court. The three issues presented on appeal (*supra*, at page 5) all involve the extent of authority granted by New Hampshire law to the petitioner and the respondents with respect to the licensing and installation of the siren poles. In addressing these issues, the New Hampshire Supreme Court was directed to[1] and relied exclusively upon state statutory and common law grounds. The New Hampshire Supreme Court neither considered nor decided any question of federal law. Indeed, other than a reference to the Nuclear Regulatory Commission's requirement that a nuclear plant operator develop a radiological emergency response plan, the New Hampshire Supreme Court's opinion does not recite or rely upon any federal statute. In particular, the New Hampshire Supreme Court did not cite, or decide any issue arising under, the Atomic Energy Act of 1954, as amended, 42 U.S.C. §2011 *et seq.* Neither did the State court consider any issue relating to the preemptive effect of the provisions of the Atomic Energy Act upon State law.

---

[1] It is noteworthy that the petitioner did not cite any federal case or statute in its brief on appeal to the New Hampshire Supreme Court.

Thus, contrary to the assertion of petitioner (Petition, page 7-8), this case has never involved nor required the construction and interpretation of the Atomic Energy Act.

II. THE DECISION OF THE NEW HAMPSHIRE SUPREME COURT RESTS UPON ADEQUATE AND INDEPENDENT STATE GROUNDS.

The holding of the New Hampshire Supreme Court was that:

> ... the trial court erred in ruling that the pole licenses had been granted without statutory authority and hence were null and void, and in ordering PSNH to remove the poles and sirens which PSNH had erected and placed in Rye and Hampton Falls.

Appendix to Petition, page 50.

This holding is based entirely upon the Court's construction of N.H. Rev. Stat. Ann. §231:160-161 and also its interpretation of its own prior case law, particularly *Vernet v. Town of Exeter*, 129 N.H. 34, 523 A.2d 48 (1986). Thus, even if this case involved any federal question, it is clear that the New Hampshire Supreme Court's decision was based upon independent and adequate state law grounds that preclude this Court's review. *Fox Film Corp. v. Muller*, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935).

III. THE NEW HAMPSHIRE SUPREME COURT'S DECISION DOES NOT CONFLICT WITH ANY FEDERAL RIGHT OR ANY PRIOR FEDERAL COURT DECISION.

In its decision, the New Hampshire Supreme Court held that N.H. Rev. Stat. Ann. §231:160-161 authorized the NHDOT to license the siren poles at issue, and also that the same statutes did not empower the petitioner to veto the erection of the siren poles proposed by PSNH as a part of its Radiological Emergency Response Plan. This decision did not violate any federal right of the petitioner, nor did it conflict with prior federal court decisions.

The petitioner claims a right, purportedly guaranteed by federal statutes and case law, to refuse to allow the installation of emergency warning sirens for a nuclear power plant within its local jurisdiction. This supposed right does not exist, however, as the cases cited by the petitioner in support of it are wildly inapposite. Petitioner's principal authority, *Citizens for an Orderly Energy Policy v. Suffolk County*, 604 F.Supp. 1084 (E.D.N.Y. 1985), aff'd. 813 F.2d 570 (1987), held only that a county's refusal to participate in radiological emergency planning for a nuclear power facility was not preempted by the Atomic Energy Act. This case cannot reasonably be read as authority for a local government's "right" to actively regulate a nuclear plant operator's implementation of its Radiological Emergency Response Plan. Indeed, in ruling that the County's inaction did not conflict with federal law, the court made it clear that the kind of affirmative action contemplated by petitioner herein was preempted:

> Certainly the County may not require LILCO to comply with the County's requirements for a satisfactory RERP; whether LILCO's RERP is sufficient is a question for the NRC and the County may not override the NRC's judgment.

Citizens for an Orderly Energy Policy, supra, at 1094.

The petitioner's reliance on *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 104 S.Ct. 615, 78 L.Ed.2d 443 (1984) is also misplaced. In *Silkwood*, this Court held that a state-authorized award of punitive damages for injuries arising out of the escape of plutonium from a nuclear facility was not preempted by the Atomic Energy Act. The Court's conclusion that Congress intended that state tort remedies be available to parties injured by nuclear accidents, even though federal law entirely occupied the field of nuclear safety regulation, lends no support to the petitioner's claimed right to reject a component of a state-and federally-mandated radiological emergency response plan.

Indeed, the petitioner's claim that "a safety-related function is reserved for localities" (Petition, at page 19) is directly contrary to this Court's decisions. See *e.g.*, *Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission*, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983). Based on the *Silkwood* and *Pacific Gas & Electric Co.* cases, it is abundantly clear that the petitioner has no federal right to take any action with respect to emergency warning sirens installed as a component of a utility's radiological emergency response plan.

In any event, the New Hampshire Supreme Court's decision in this matter is not in conflict with the above-cited cases. The State Court's holding that the petitioner was not authorized by the State utility pole licensing statute to overrule the siren pole licenses issued by NHDOT, or to revoke its own licenses for reasons other than those contemplated by the statute, is not in any way inconsistent with this Court's delineation of the relative roles of the state and federal governments with respect to the regulation of nuclear power.

CONCLUSION

The petitioner asserts that the resolution of this case will affect "the exercise of traditional authority of state and local governments, the regulation of nuclear power by the federal government, and the interaction between federal and local areas of regulation". Petition, at page 7. Despite these grandiose claims, this case has no such import.

The decision of the New Hampshire Supreme Court in this matter addresses no substantial federal question that would justify an assertion of this Court's jurisdiction under 28 U.S.C. §1257(3). That Court's decision is based entirely upon adequate state law grounds independent of any federal issue. The New Hampshire Supreme Court's decision is not in conflict with any established federal right, nor is it inconsistent with prior federal case law. Lacking any consideration of a substantial federal question, and any inconsistency with applicable

statutory and case law, the decision of the New Hampshire Supreme Court is jurisdictionally inappropriate for review by this Court.

For all of these reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE
Department of Transportation

By its attorneys,

Stephen E. Merrill
Attorney General

Michael J. Walls
Assistant Attorney General

Office of the Attorney General
State House Annex
25 Capitol Street
Concord, New Hampshire 03301
(603)271-3675